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CASES

ON

PRINCIPAL AND AGENT

SELECTED FROM DECISIONS OF

ENGLISH AND AMERICAN COURTS

BY

EDWIN C. GODDARD, PH. B., LL. B.

PROFESSOR OF LAW IN THE UNIVERSITY OF MICHIGAN

AMERICAN CASEBOOK SERIES

JAMES BROWN SCOTT

GENERAL EDITOR

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THE AMERICAN CASEBOOK SERIES

FOR years past the science of law has been taught by lectures, the use of text-books and more recently by the detailed study, in the class-room, of selected cases.

Each method has its advocates, but it is generally agreed that the lecture system should be discarded because in it the lecturer does the work and the student is either a willing receptacle or offers a passive resistance. It is not too much to say that the lecture system is doomed.

Instruction by the means of text-books as a supplement or substitute for the formal lecture has made its formal entry into the educational world and obtains widely; but the system is faulty and must pass away as the exclusive means of studying and teaching law. It is an improvement on the formal lecture in that the student works, but if it cannot be said that he works to no purpose, it is a fact that he works from the wrong end. The rule is learned without the reason, or both rule and reason are stated in the abstract as the resultant rather than as the process. If we forget the rule we cannot solve the problem; if we have learned to solve the problem it is a simple matter to formulate a rule of our own. The text-book method may strengthen the memory; it may not train the mind, nor does it necessarily strengthen it. A text, if it be short, is at best a summary, and a summary presupposes previous knowledge.

If, however, law be considered as a science rather than a collection of arbitrary rules and regulations, it follows that it should be studied as a science. Thus to state the problem is to solve it; the laboratory method has displaced the lecture, and the text yields to the actual experiment. The law reports are in more senses than one books of experiments, and, by studying the actual case, the student co-operates with the judge and works out the conclusion however complicated the facts or the principles involved. A study of cases arranged historically develops the knowledge of the law, and each case is seen to be not an isolated fact but a necessary link in the chain of development. The study of the case is clearly the most practical method, for the student already does in his undergraduate days what he must do all his life; it is curiously the most theoretical and the most practical. For a discussion of the case in all its parts develops analysis, the comparison of many cases establishes a general principle, and

the arrangement and classification of principles dealing with a subject make the law on that subject.

In this way TRAINING AND KNOWLEDGE, the means and the end of legal study, go hand and hand.

The obvious advantages of the study of law by means of selected cases make its universal adoption a mere question of time.

The only serious objections made to the case method are that it takes too much time to give a student the requisite knowledge of the subject in this way and that the system loses sight of the difference between the preparation of the student and the lifelong training of the lawyer. Many collections of cases seem open to these objections, for they are so bulky that it is impossible to cover a particular subject with them in the time ordinarily allotted to it in the class. In this way the student discusses only a part of a subject. His knowledge is thorough as far as it goes, but it is incomplete and fragmentary. The knowledge of the subject as a whole is deliberately sacrificed to training in a part of the subject.

It would seem axiomatic that the size of the casebook should correspond in general to the amount of time at the disposal of instructor and student. As the time element is, in most cases, a nonexpansive quantity, it necessarily follows that, if only a half to two-thirds of the cases in the present collections can be discussed in class, the present casebooks are a third to a half too long. From a purely practical and economic standpoint it is a mistake to ask students to pay for 1,200 pages when they can only use 600, and it must be remembered that in many schools, and with many students in all schools, the matter of the cost of casebooks is important. Therefore, for purely practical reasons, it is believed that there is a demand for casebooks physically adapted and intended for use as a whole in the class-room.

But aside from this, as has been said, the existing plan sacrifices knowledge to training. It is not denied that training is important, nor that for a law student, considering the small amount of actual knowledge the school can hope to give him in comparison with the vast and daily growing body of the law, it is more important than mere knowledge. It is, however, confidently asserted that knowledge is, after all, not unimportant, and that, in the inevitable compromise between training and knowledge, the present casebooks not only devote too little attention relatively to the inculcation of knowledge, but that they sacrifice unnecessarily knowledge to training. It is believed that a greater effort should be made to cover the general principles of a given subject in the time allotted, even at the expense of a considerable sacrifice of detail. But in this proposed readjustment of the means to the end, the fundamental fact cannot be overlooked that law is a developing science and that its present can only be understood through the medium of its past. It is recognized as imperative that a sufficient number of cases be given under each topic

treated to afford a basis for comparison and discrimination; to show the development of the law of the particular topic under discussion; and to afford the mental training for which the case system necessarily stands. To take a familiar illustration: If it is proposed to include in a casebook on Criminal Law one case on abortion, one on libel, two on perjury, one on larceny from an office, and if in order to do this it is necessary to limit the number of cases on specific intent to such a degree as to leave too few on this topic to develop it fully and to furnish the student with training, then the subjects of abortion, libel, perjury, and larceny from an office should be wholly omitted. The student must needs acquire an adequate knowledge of these subjects, but the training already had in the underlying principles of criminal law will render the acquisition of this knowledge comparatively easy. The exercise of a wise discretion would treat fundamentals thoroughly; principle should not yield to detail.

Impressed by the excellence of the case system as a means of legal education, but convinced that no satisfactory adjustment of the conflict between training and knowledge under existing time restrictions has yet been found, the General Editor takes pleasure in announcing a series of scholarly casebooks, prepared with special reference to the needs and limitations of the class-room, on the fundamental subjects of legal education, which, through a judicious rearrangement of emphasis, shall provide adequate training combined with a thorough knowledge of the general principles of the subject. The collection will develop the law historically and scientifically; English cases will give the origin and development of the law in England; American cases will trace its expansion and modification in America; notes and annotations will suggest phases omitted in the printed case. Cumulative references will be avoided, for the footnote may not hope to rival the digest.

The law will thus be presented as an organic growth, and the necessary connection between the past and the present will be obvious.

The importance and difficulty of the subject as well as the time that can properly be devoted to it will be carefully considered so that each book may be completed within the time allotted to the particular subject.

It is equally obvious that some subjects are treated at too great length, and that a less important subject demands briefer treatment. A small book for a small subject.

In this way it will be alike possible for teacher and class to complete each book instead of skimming it or neglecting whole sections; and more subjects may be elected by the student if presented in shorter form based upon the relative importance of the subject and the time allotted to its mastery.

Training and knowledge go hand in hand, and Training and Knowledge are the keynotes of the series.

If it be granted that all, or nearly all, the studies required for admission to the bar should be studied in course by every student—and the soundness of this contention can hardly be seriously doubted—it follows necessarily that the preparation and publication of collections of cases exactly adapted to the purpose would be a genuine and by no means unimportant service to the cause of legal education. And this result can best be obtained by the preparation of a systematic series of casebooks constructed upon a uniform plan under the supervision of an editor in chief.

For the basis of calculation the hour has been taken as the unit. The General Editor's personal experience, supplemented by the experience of others in the class-room, leads to the belief that approximately a book of 400 pages may be covered by the average student in half a year of two hours a week; that a book of 600 pages may be discussed in class in three hours for half a year; that a book of 800 pages may be completed by the student in two hours a week throughout the year; and a class may reasonably hope to master a volume of 1,000 pages in a year of three hours a week. The general rule will be subject to some modifications in connection with particular topics on due consideration of their relative importance and difficulty, and the time ordinarily allotted to them in the law school curriculum.

The following subjects are deemed essential in that a knowledge of them (with the exception of International Law and General Jurisprudence) is universally required for admission to the bar:

Administrative Law.
Agency.
Bills and Notes.
Carriers.
Contracts.
Corporations.
Constitutional Law.
Criminal Law.
Criminal Procedure.
Common-Law Pleading.
Conflict of Laws.
Code Pleading.
Damages.
Domestic Relations.
Equity.
Equity Pleading.
Evidence.
Insurance.
International Law.
Jurisprudence.
Mortgages.
Partnership.
Personal Property, including the Law of Bailment.
Real Property. { 1st Year. / 2d " / 3d "
Public Corporations.
Quasi Contracts.
Sales.
Suretyship.
Torts.
Trusts.
Wills and Administration.

International Law is included in the list of essentials from its intrinsic importance in our system of law. As its principles are simple in comparison with municipal law, as their application is less technical,

and as the cases are generally interesting, it is thought that the book may be larger than otherwise would be the case.

As an introduction to the series a book of Selections on General Jurisprudence of about 500 pages is deemed essential to completeness.

The preparation of the casebooks has been intrusted to experienced and well-known teachers of the various subjects included, so that the experience of the class-room and the needs of the students will furnish a sound basis of selection.

While a further list is contemplated of usual but relatively less important subjects as tested by the requirements for admission to the bar, no announcement of them is made at present.

The following gentlemen of standing and repute in the profession have written or are at present actively engaged in the preparation of the various casebooks on the indicated subjects:

George W. Kirchwey, Professor of Law, Columbia University, School of Law. *Subject, Real Property.*

Nathan Abbott, Professor of Law, Columbia University. (Formerly Dean of the Stanford University Law School.) *Subject, Personal Property.*

Frank Irvine, Dean of the Cornell University School of Law. *Subject, Evidence.*

Harry S. Richards, Dean of the University of Wisconsin School of Law. *Subject, Corporations.*

James Parker Hall, Dean of the University of Chicago School of Law. *Subject, Constitutional Law.*

William R. Vance, Dean of the University of Minnesota Law School. *Subject, Insurance.*

Charles M. Hepburn, Professor of Law, University of Indiana. *Subject, Torts.*

William E. Mikell, Professor of Law, University of Pennsylvania. *Subjects, Criminal Law and Criminal Procedure.*

George P. Costigan, Jr., Professor of Law, Northwestern University Law School. *Subject, Wills and Administration.*

Floyd R. Mechem, Professor of Law, Chicago University. *Subject, Damages.* (Co-author with Barry Gilbert.)

Barry Gilbert, Professor of Law, University of Iowa. *Subject, Damages.* (Co-author with Floyd R. Mechem.)

Thaddeus D. Kenneson, Professor of Law, University of New York. *Subject, Trusts.*

Charles Thaddeus Terry, Professor of Law, Columbia University. *Subject, Contracts.*

Albert M. Kales, Professor of Law, Northwestern University. *Subject, Persons.*

Edwin C. Goddard, Professor of Law, University of Michigan. *Subject, Agency.*

Howard L. Smith, Professor of Law, University of Wisconsin. *Subject, Bills and Notes.* (Co-author with Wm. Underhill Moore.)

Wm. Underhill Moore, Professor of Law, University of Wisconsin. *Subject, Bills and Notes.* (Co-author with Howard L. Smith.)

Edward S. Thurston, Professor of Law, University of Minnesota. *Subject, Quasi Contracts.*

Crawford D. Hening, Professor of Law, University of Pennsylvania. *Subject, Suretyship.*

Clarke B. Whittier, Professor of Law, University of Chicago. *Subject, Pleading.*

Eugene A. Gilmore, Professor of Law, University of Wisconsin. *Subject, Partnership.*

Ernst Freund, Professor of Law, University of Chicago. *Subject, Administrative Law.*

Frederick Green, Professor of Law, University of Illinois. *Subject, Carriers.*

Ernest G. Lorenzen, Professor of Law, University of Wisconsin. *Subject, Conflict of Laws.*

Frederic C. Woodward, Dean of the Stanford University Law School. *Subject, Sales.*

George H. Boke, Professor of Law, University of California. *Subject, Equity.*

James Brown Scott, Lecturer on International Law and Diplomacy in Johns Hopkins University; formerly Professor of Law, Columbia University. *Subjects, International Law; General Jurisprudence.*

JAMES BROWN SCOTT,
General Editor.

WASHINGTON, D. C., October, 1913.

Following are the books of the Series now published, or in press:

Administrative Law
Agency
Bills and Notes
Carriers
Conflict of Laws
Constitutional Law
Corporations
Criminal Law
Criminal Procedure
Damages
Partnership
Persons
Pleading
Sales
Suretyship
Trusts
Wills and Administration

AUTHOR'S PREFATORY NOTE

It is a striking proof of the fact that Agency is a modern subject in the law that Blackstone, in his Commentaries on the Laws of England, does not mention the subject by name, and barely makes a four-line reference to one sort of agent in his classification of servants. The old cases do, of course, sometimes deal with pure agency questions, but the agent is usually referred to as a servant or a factor, and the questions in issue are generally settled upon some principle of the law of Master and Servant. Agency is essentially a business relation; hence its modernness, if that term may be permitted; hence, also, the singular fact that until within very few years courts treated it as a broadened service, involving wider discretion, and failed to see that its main difference from service is that it deals with a relation for a very different purpose—in other words, that the difference is in kind even more than in degree.

To an extent the law of Principal and Agent is an outgrowth of the law of Master and Servant. The doctrine of respondeat superior is most active in both. The old cases of Master and Servant are therefore in one portion of the field of Agency valuable and illuminating, and are equally valuable to illustrate either relation; but they deal to a considerable extent with questions of tort liability as to third persons, and of contract and tort between the primary parties to the relation, and these are far from being the most important parts of the law of Agency. A casebook on Agency, then, if it is well proportioned, will be made up of modern cases far more than will a work on Property, for example, or on Contracts in general. The present work contains many early cases of historical importance, some involving Agency, but more turning on questions arising out of the relation of Master and Servant. Very largely, however, selections have been made from modern cases, in which the courts are dealing with real agency matters.

No one has stated more clearly and aptly than the learned Chief Justice Shaw, in the Norway Plains case, the great merits and advantages of the common law, that instead of a series of detailed practical rules adapted to precise circumstances, which would become obsolete when conditions change, it consists of a few broad, comprehensive principles, founded on reason, natural justice, and enlightened public policy, which by usage, custom, and still more by judicial exposition, are adapted to new practices and new combinations of fact, as conditions change and a new practice or a new course of business arises; so that in this new field, without the aid of legislation, the principles and

rules soon become precise and established, by a development from cases most nearly analogous, modified and adapted to the new circumstances. By such a process as this has the law of this modern subject of Agency taken, and modified and amplified, ancient rules in cases most nearly analogous, until we have, largely without the aid of statutes, the great body of law in this business relation, the development of which was essential to the growth of the modern commercial world, in which the maxim "Qui facit per alium facit per se" enables one man to be at the same moment in as many places, and as widely apart, as the extent of his resources and the character of his ability permit him to secure and maintain agencies. Whatever the relation between the present idea of Agency, and the old conception of the incidents attaching to the relation of Master and Servant, we cannot understandingly and correctly deal with the questions of Agency without recognizing, on the one hand, that it evolved from the law of Master and Servant, and has not become entirely severed from it, and, on the other, that in its most important fields it has developed a great body of law quite apart from its ancestral subject, because it is, as the other is not, essentially a business subject, developed in response to the demands of our modern commercial world.

EDWIN C. GODDARD.

ANN ARBOR, November 1, 1913.

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CASES ON PRINCIPAL AND AGENT

PART I

THE RELATION

CHAPTER I

DEFINITION AND NATURE OF THE RELATION

BLACKSTONE'S COMMENTARIES, BOOK I, CH. 14, I, 4.

There is yet a fourth species of servants, if they may be so called, being rather in a superior, a ministerial, capacity, such as stewards, factors, and bailiffs, whom, however, the law considers as servants pro tempore, with regard to such of their acts as affect their master's or employer's property.

ECHOLS v. STATE.

(Supreme Court of Alabama, 1909. 158 Ala. 48, 48 South. 347.)

From a conviction of embezzlement defendant appeals.

SIMPSON, J. The appellant was convicted of the offense of embezzlement; the affidavit charging that he, "being an agent, servant, or clerk of affiant, embezzled or fraudulently converted to his own use money to about the amount of $18, or fraudulently secretes, with intent to convert to his own use, or to the use of another, $18 in money which has come into his possession by virtue of his office or employment." The evidence for the state, in its strongest light against the defendant, is that the defendant, being a tailor, agreed to make a suit of clothes for the prosecutor for a certain amount of money, part of which was to be paid in cash and the remainder to be paid in the fu-

ture; that the prosecutor made the cash payment and demanded his suit of clothes; that defendant refused to deliver it without the payment of more money, and also refused to return his money.

This court said, in discussing a former statute (which was identical with section 6831 of the Code of 1907, in so far as the point involved is concerned), that an agent is "one who undertakes to transact some business or to manage some affair for another, by the authority and on account of the latter, and to render an account of it"; also that "'agent,' as employed in this section, imports a principal, and implies employment, service, delegated authority to do something in the name and stead of the principal." Pullam v. State, 78 Ala. 31, 34, 56 Am. Rep. 21. The relation of principal and agent did not exist between the prosecutor and the defendant, but the relation of seller and purchaser. The defendant did not undertake to do anything in the name and stead of the prosecutor. The money was not placed in his hands to be used or cared for, and accounted for to the prosecutor, but was paid to him in part settlement for a suit of clothes, and thereby became the money of the defendant, to use as he pleased. Whatever other liability or penalty the defendant may have incurred, he could not be convicted of embezzlement on the facts of this case. Consequently the defendant was entitled to the general charge, as requested and refused.

The judgment of the court is reversed, and the cause remanded.

STERNAMAN v. METROPOLITAN LIFE INS. CO.

(Court of Appeals of New York, 1902. 170 N. Y. 13, 62 N. E. 763, 57 L. R. A. 318, 88 Am. St. Rep. 625.)

Appeal from a judgment for defendant in an action upon a policy of insurance issued to plaintiff upon the life of her husband, George Sternaman. The contract provided that the application for the insurance should become part of the contract of insurance, and that the medical examiner, in writing in the answers of the applicant, was the agent of the latter and not of the company. Upon the death of the insured payment of the policy was refused, on the ground that some of the answers written in by the medical examiner were not true, and hence the policy was void.

VANN, J.[1] [After stating the facts:] The decision of this appeal turns substantially upon the following question: When an applicant for life insurance makes truthful answers to all questions asked by the medical examiner, who fails to record them as given, and omits an important part, stating that it is unimportant, can the beneficiary show the answers actually given, in order to defeat a forfeiture claimed by

[1] Part of the opinion is omitted.

the insurer on account of the falsity of the answers as recorded, even if it was agreed in the application that the medical examiner, employed and paid by the insurer only, should not be its agent, but solely the agent of the insured?

The power to contract is not unlimited. While, as a general rule, there is the utmost freedom of action in this regard, some restrictions are placed upon the right by legislation, by public policy, and by the nature of things. Parties cannot make a binding contract in violation of law or of public policy. They cannot in the same instrument agree that a thing exists, and that it does not exist, or provide that one is the agent of the other, and at the same time, and with reference to the same subject, that there is no relation of agency between them. They cannot bind themselves by agreeing that a loan in fact void for usury is not usurious, or that a copartnership which actually exists between them does not exist. They cannot by agreement change the laws of nature or of logic, or create relations, physical, legal, or moral, which cannot be created. In other words, they cannot accomplish the impossible by contract.

The parties to the policy in question could agree that the person who filled out part A of the application was the agent of the insured and not of the company. There is a difference in the nature of the work of filling out the blank to be signed by the insured, and that of filling out the blank furnished for the use of the medical examiner. The former is the work of the insured, and may be done as well by one person as by another. He may do it himself, or appoint an agent to do it for him. It is quite different, however, with the work of the medical examiner, because that requires professional skill and experience and the insurer permits it to be done only by its own appointee. The insured can neither do that work himself, nor appoint a physician to do it, because the insurer very properly insists upon making the selection itself. The medical examiner was selected, employed, and paid by the company. The insured had nothing to do with him, except to submit to an examination by him, as the expert of the company, and to answer the questions asked by him in behalf of the company. This he was forced to do in order to procure insurance; for the company required him to undergo a medical examination by an examiner selected and instructed by itself, before it would act upon his application for a policy. He could neither refuse to be examined, nor select the examiner, and he was not responsible if the latter was negligent or unfit for the duty assigned to him. He could not direct or control him, but the company could and did; for it required him to make the examination, fill out part B of the application blank, and report the facts with his opinion. The insured made no contract with the examiner, and was under no obligation to pay him for his services. The company, however, made a contract with him to do certain work for it, and agreed to pay him for the work when done.

As between the examiner and the insured, the relation of principal and agent did not exist, while, as between the examiner and the company, that relation did exist by operation of law; yet it is claimed that, as between the insured and the company, the examiner was the agent of the former only, because he had so agreed, not with the examiner, but with the company itself. Under the circumstances, an agreement that the physician was the agent of the insured was like an agreement that the company or its president was his agent. It was in contradiction of every act of the parties and of every fact known to either. The law, when applied to the facts, made the physician the agent of the company, and not of the insured; and can it be held that, as the insured agreed that the physician was his agent, he became such in spite of the law and the facts? This is not a case of agency of one party for one purpose, and of another party for a different purpose; for the physician was employed for a single purpose only, and that was to make a physical examination of the insured, ask him the questions furnished by the company, record his answers, and report the result. They were not the questions of the insured, put to himself, to elicit facts for his use. He knew the facts. He did not need to question himself to find out what he knew, nor to employ an agent for that purpose. The questions were those of the company, carefully prepared for it by skillful hands, and furnished to its medical examiner to be asked, so that it could learn what the insured knew about himself. It needed the facts for its use, and what was done by its own examiner to get the facts and report them to the company was its work, done for its benefit and in the course of its business. The answers were not volunteered, but were given in response to questions asked by the company, as much as if, impersonated, it had actually asked them as an individual. Whatever it told Dr. Langley to do for it, in the view of the law, it did itself. "Qui facit per alium, facit per se." It appointed Dr. Langley its agent for the purpose named, and he derived all his authority to act from the company, which could regulate his conduct by its rules, and could provide for such security to protect its interests from the consequences of his neglect or default as it saw fit.

Can parties agree that facts, which the law declares establish a certain relation, not only do not establish that relation, but establish directly the opposite? Can A. appoint B. his agent for a definite purpose, and then agree with C. that B. is not the agent of A., but is the agent of C. for that purpose; there being no agreement whatever between B. and C.?

An agency is created by contract, express or implied. It "is a legal relation by virtue of which one party (the agent) is employed and authorized to represent and act for the other (the principal) in business dealings with third persons. The distinguishing features of the agent are his representative character and his derivative authority." Mech-

em, Ag. § 1; Story, Ag. § 3. "To constitute agency there must be consent both of principal and of agent." Whart. Ag. § 1. What was the contract between the company and the examiner? The defendant, being a corporation, could act only through agents. Having some work to do in the form of a medical examination, it requested Dr. Langley to do it. It created the relation of agency between him and itself by employing him, paying him, etc. It alone could discharge him, and to it alone was he responsible for disobedience or negligence. It could control his conduct by any reasonable instructions, and hold him liable if he violated them. It prescribed certain questions that he should ask, and required him to take down the answers in a blank prepared by itself. It could sue him if he did not do it properly, and he could sue the company if it did not pay him for doing it. Thus we have an agency between the company and the examiner established by mutual agreement, with the right on the one hand to instruct, to discharge, and to hold liable for default, and on the other to compel payment for services rendered. Hence what the examiner did in the course of his employment the company did, and what he knew from discovery while acting for it the company knew.

What was the contract between the insured and the examiner? None whatever. The insured did not employ the examiner, and the examiner did not agree to work for him. Neither was under any legal obligation or liability to the other. The insured could not instruct the doctor, nor discharge him, nor sue him for negligence, and the doctor could not sue the insured for compensation. The relation of principal and agent did not exist between them, either by virtue of any contract or by operation of law.

What was the contract between the insured and the insurer? With the relations above described as existing between the insurer and the examiner in full force, and in the absence of any legal relation between the examiner and the insured, an attempt was made by the insurer, by an agreement imposed upon the insured, to subvert the relation of its own examiner to itself, and establish a relation between him and the insured, without the consent of either given to the other. There was no tripartite contract. While the contract between the doctor and the company was still in existence, the latter agreed with a third party only that that contract did not in fact exist between the two parties who made it, but did exist between two parties who did not make it. This was not possible by any form of words, any more than to make black white, or truth falsehood. We think that the medical examiner was the agent of the defendant in making the examination of the insured, recording his answers, and reporting them to the company. * * *

Judgment reversed.[2]

[2] The dissenting opinion of Parker, C. J., with whom Gray, J., concurs, is omitted.

KINGAN & CO. v. SILVERS et al.

(Appellate Court of Indiana, 1894. 13 Ind. App. 80, 37 N. E. 413.)

Appeal from a judgment for defendant in an action on a promissory note bearing interest at 8 per cent., "after maturity." The note was procured by plaintiff's traveling salesman, one Nichols, who, without the consent or knowledge of defendants, altered it by striking out the words "after maturity" and inserting words so as to make it bear 8 per cent. interest "from date." Plaintiffs never approved the alteration, and now sue upon the note as originally made. It was no part of the duty of Nichols to make settlements, nor to take notes, but in this instance he had been instructed by plaintiffs to procure from defendants a note to cover their indebtedness to plaintiffs, and to transmit the same to his principals.

LOTZ, J.[3] [After stating the facts, and pointing out the general principle that public policy demands that a material alteration of a written instrument shall destroy it so as to prevent a recovery upon it:] * * * The rules that now prevail, as we gather them from the decided cases, are: (1) That the alteration of a note or written instrument in a material matter by a stranger is but a spoliation, and does not destroy it, and a recovery may be had on it in its original condition. (2) If the plaintiff, the obligee, or the holder make an alteration in an immaterial matter, the alteration does not destroy the note, but a recovery may be had on it in its original condition. (3) But if the alteration be in a material matter, and be purposely or intentionally made by the plaintiff, the obligee, or the holder, such alteration destroys the note or instrument, and no recovery can be had upon it in either its original or altered condition. The last rule is the same as one of the rules laid down by Lord Coke in Pigot's Case, and is still the law.

If the case at bar falls within this latter rule, then the demurrers were correctly sustained. The change in the note was not made by the plaintiff's order or direction, but it intrusted certain business to another as its agent, and such person made the alteration. If the alteration was made by the agent while in the transaction of the principal's business, and in the scope of his authority, then the act of the agent is the act of the principal,—"qui facit per alium facit per se." The solution of this case depends upon the relation existing between Nichols and the plaintiff at the time the alteration was made. If he was the plaintiff's agent, and the act was within the scope of his authority, then his act must be deemed the act of the plaintiff, and the law is with the defendants. If his position was that of a mere stranger to the note, then the law is with the plaintiff.

The appellees rely confidently upon the case of Eckert v. Louis, 84

[3] Part of the opinion is omitted.

Ind. 99, as furnishing a rule binding upon this court, and as decisive of the questions here involved. The facts of that case briefly are that a note had been signed by a principal and his surety, and was by the principal delivered to the agent of the payees. In a short time after the delivery the note was altered in a material respect, by the person to whom it had been delivered. Such change was made in the presence of the principal, and with his consent; but the change was without the knowledge or consent of the surety. Suit was instituted against the surety alone on the note in its altered condition. The court held that there could be no recovery in such an action against the surety. It seems to us that the bare statement of the facts shows the correctness of the holding. The note was changed in a material respect, and yet the effort was to enforce it in its altered condition. The position occupied by the person making the change was wholly immaterial to the decision of that case. If he was a stranger to the note, and his act a spoliation, the note could not be enforced against the surety in its altered condition. Neither could the payees enforce the note in its altered condition, if the person making the change was their agent. There could be no recovery upon the note in its altered condition. What is said in that case on the subject of agency is foreign to the point in judgment, and cannot be deemed authority. Even if it be conceded that what is said in that case upon the subject of agency correctly states the law as to the facts of that case, still the facts there are very different from this case. There the agent was instructed and directed by the principal to collect the money, or obtain undoubted security, and not to leave until he had done so. In making the change the agent's "sole effort and desire were to obey strictly the orders of the plaintiff (the payee) which were * * * to collect their debt or procure * * * undoubted security." The alteration was made in the presence of the principal debtor, and with his knowledge and consent. In making the change the agent was acting with a third party in commercial dealings. The payees sought to enforce the note in the altered condition. In so doing, they accepted and ratified the action of their agent, and made his act their own act. Under such circumstances, it was unimportant whether the agent was acting within his authority or not at the time of the alteration. The subsequent ratification made his act the act of the payees. Here the effort is not to enforce the note in its altered condition, but in its original state. Again, the case to which we have alluded differs from this in another respect. That was an action against a surety, and a surety is a favorite of the law.

The appellees further insist that Nichols was the agent of the payee in making the alteration; that he was acting in the line of his agency, and under color of his employment; that his wrongful act is imputable to his principal. In support of this position appellees' learned counsel say this is upon the legal maxim, " 'Whatever a man sui juris may do of himself, he may do by another,' and, as a correlative, whatever is

done by such other in the course of his employment is deemed to be done by the party himself. On this principle the liability of one person for the acts of another who is employed in the capacity of an agent is extended to the wrongful and tortious acts of the latter committed in the line and under color of the agency, although such unlawful acts were not contemplated by the employment, and were done by the agent in good faith, and by mistake. In other words, where a principal directs an act to be done by an agent in a lawful manner, but the agent errs in the mode of executing his authority to the prejudice of another person, the principal will be held responsible." This is a correct statement of the law. The same principles extend to the relations existing between a master and his servant. Thus, if the engineer of a railway company negligently run a train of cars over a person who is without fault, the company is liable for the injury caused. The same doctrine is applied to the willful acts and the mistakes of agents and servants, committed by them while acting within the scope of the agency or line of the employment. May v. Bliss, 22 Vt. 477; Luttrell v. Hazen, 3 Sneed (Tenn.) 20; Pennsylvania Co. v. Weddle, 100 Ind. 138; Railroad Co. v. McKee, 99 Ind. 519, 50 Am. Rep. 102; Crockett v. Calvert, 8 Ind. 127.

At the time Nichols made the alteration of the note, was he the agent or servant of the plaintiff in respect to his duties pertaining to said note? It is averred that he was the traveling salesman, but that he was not a general agent, and had no authority to make settlements or take notes on plaintiff's account, nor was that any part of his duties; that, being about to go to Lebanon in the course of his duties as such traveling salesman, the plaintiff instructed him to procure for plaintiff from the defendants a note on account of an indebtedness due from them to the plaintiff. But the averments of the complaint negativing the fact of agency will not control if it appear from all the averments that the legal relation of agency exists. The same person may be a special agent for the same principal in several different matters. Nichols was the agent of the plaintiff to sell goods. He was also its agent to procure the note. We are here concerned with the latter agency only. Did his relation as agent cease when he obtained the note, or did it continue until the note was delivered to the plaintiff? If the agency ceased when the note was obtained by him, what relation did he sustain to the plaintiff in the interval of time between the delivery to him and the delivery to the plaintiff? This leads to the inquiry, who are agents, and who are servants? In the primitive conditions of society, the things which were the subjects of sale and trade were few in number. There was little occasion for any one to engage in commercial transactions, and when it did become necessary the business was generally transacted by the parties thereto in person. But the strong and powerful had many servants, who were usually slaves. The servants performed menial and manual services for the master.

As civilization advanced, the things which are the subjects of commerce increased, and it became necessary to perform commercial transactions through the medium of other persons.

The relation of principal and agent is but an outgrowth or expansion of the relation of master and servant. The same rules that apply to the one generally apply to the other. There is a marked similarity in the legal consequences flowing from the two relations. It is often difficult to distinguish the difference between an agent and a servant. This difficulty is increased by the fact that the same individual often combines in his own person the functions of both agent and servant. Agents are often denominated servants, and servants are often called agents. The word "servant" in its broadest meaning, includes an agent. There is, however, in legal contemplation, a difference between an agent and a servant. The Romans, to whom we are indebted for many of the principles of agency, in the early stages of their laws used the terms "mandatum" (to put into one's hand, or confide to the discretion of another) and "negotium" (to transact business, or to treat concerning purchases) in describing this relation. Story, Ag. § 4. Agency, properly speaking, relates to commercial or business transactions, while service has reference to actions upon or concerning things. Service deals with matters of manual or mechanical execution. An agent is the more direct representative of the master, and clothed with higher powers and broader discretion than a servant. Mechem, Ag. §§ 1, 2.

The terms "agent" and "servant" are so frequently used interchangeably in the adjudications that the reader is apt to conclude they mean the same thing. We think, however, that the history of the law bearing on this subject shows that there is a difference between them. Agency, in its legal sense, always imports commercial dealings between two parties by and through the medium of another. An agent negotiates or treats with third parties in commercial matters for another. When Nichols was engaged in treating with the defendants concerning the note, he was an agent. When the note was delivered to him, it was in law delivered to the plaintiff, and he ceased to treat or deal with the defendants. All his duties concerning the note then related to the plaintiff. It was his duty to carry and deliver it to the plaintiff. In doing this he owed no duty to the defendants. He ceased to be an agent, because he was not required to deal further with third parties. He was then a mere servant of the plaintiff, charged with the duty of faithfully carrying and delivering the note to his master. When Nichols made the alteration in the note he was the servant, and not the agent, of the plaintiff.[4] * * *

Judgment reversed.

DAVIS, C. J., and GAVIN, J., dissent.

[4] The rest of the opinion is an historical survey of the relation of master and servant. It is often said that the distinction between principal and agent

TAYLOR et al. v. DAVIS' ADM'X.

(Supreme Court of the United States, 1884. 110 U. S. 330, 4 Sup. Ct. 147, 28 L. Ed. 163.)

Taylor and Davis were trustees of the Cairo City property. Davis agreed to resign his trust to one Parsons, and Taylor and Parsons then agreed to pay Davis, out of the trust funds as they should come into their hands, the amount due him at the time of his resignation. This they never did. Davis died, and his administratrix sues to hold them personally on their agreement. They claimed to have acted only for the trust property.

Mr. Justice WOODS [5] [After stating the facts and disposing of a question of practice:] * * * A trustee is not an agent.[6] An agent

and master and servant is difficult to define. The two relations are essentially similar. The true distinction lies in the nature of the service to be performed and the manner of its performance. Merritt v. Huber, 137 Iowa, 135, 114 N. W. 627 (1908). The distinction is often said to be a question of discretion; the agent having more or less discretion, while the servant acts under his master's direction and control. Singer Mfg. Co. v. Rahn, 132 U. S. 518, 10 Sup. Ct. 175, 33 L. Ed. 440 (1889); McCroskey v. Hamilton, 108 Ga. 640, 34 S. E. 111, 75 Am. St. Rep. 79 (1899); Gibson v. Hardware Co., 94 Ala. 346, 10 South. 304 (1891), post, p. 19. Occasionally the distinction is important in criminal actions under a penal statute referring to servants. An agent cannot be punished under such a statute. Regina v. Walker, 8 Cox, C. C. 1, Dears. & B. 600, 4 Jur. N. S. 465, 27 L. J. M. C. 207, 6 W. R. 505 (1858).

INDEPENDENT CONTRACTOR.—In determining the liability of a contractor to third persons for acts or contracts of a second person, it often becomes necessary to determine whether such second person dealt with the third person as an independent contractor or as the agent or servant of the first contractor. The distinction is said to lie in this: That the agent or servant represents the will of the employer, while the independent contractor represents that will only as to the result of the work, and not as to the means whereby it is accomplished. Jensen v. Barbour, 15 Mont. 582, 39 Pac. 906 (1895), citing Bibb's Adm'r v. N. & W. R. Co., 87 Va. 711, 14 S. E. 163 (1891); Brackett v. Lubke, 4 Allen, 138, 81 Am. Dec. 694 (1862). The distinction between an independent contractor and an agent is well illustrated by comparing Casement v. Brown, 148 U. S. 615, 13 Sup. Ct. 672, 37 L. Ed. 582 (1893) (independent contractor), with Railroad v. Hanning, 15 Wall. 649, 21 L. Ed. 220 (1872) (agent). See, also, Burns v. McDonald, 57 Mo. App. 599 (1894). The independent contractor, like the agent, enters into business relations with third persons, but on his own account, and not, like the agent, in behalf of his employer. Atlas Lumber Co. v. Schenck, 2 Colo. App. 246, 29 Pac. 1137 (1892).

[5] Part of the opinion is omitted.

[6] Compare Rowe v. Rand, 111 Ind. 206, 12 N. E. 377 (1887), in which one who called himself a "trustee" was held, nevertheless, to be an agent, with Lyle v. Burke, 40 Mich. 499 (1879), where it was held, per Cooley, J., that an instrument providing for placing in the hands of defendant a fund for the support of the maker of the instrument during life, and to be thereafter divided, created a trust, and not a mere agency, revocable by the maker's death. In the former case the court said: "A trustee is one to whom an estate has been conveyed in trust, and, consequently, the holding of property in trust constitutes a person a trustee. An agent is one who acts for, or in place of, another, denominated the principal, in virtue of power or authority conferred by the latter, to whom an account must be rendered. In the case of an ordinary agency for the sale or disposition of property the title to the property, as well as to the proceeds, remains in the principal." See, also,

represents and acts for his principal, who may be either a natural or artificial person. A trustee may be defined generally as a person in whom some estate interest or power in or affecting property is vested for the benefit of another. When an agent contracts in the name of his principal, the principal contracts, and is bound, but the agent is not. When a trustee contracts as such, unless he is bound, no one is bound, for he has no principal. The trust estate cannot promise; the contract is therefore the personal undertaking of the trustee. As a trustee holds the estate, although only with the power and for the purpose of managing it, he is personally bound by the contracts he makes as trustee, even when designating himself as such. The mere use by the promisor of the name of trustee or any other name of office or employment will not discharge him. Of course, when a trustee acts in good faith for the benefit of the trust, he is entitled to indemnify himself for his engagements out of the estate in his hands, and for this purpose a credit for his expenditures will be allowed in his accounts by the court having jurisdiction thereof. * * *

The judgment of the court below for the plaintiff, defendant in error in this court, was affirmed.

Weer v. Gand, 88 Ill. 490 (1878), in which it was pointed out that, while trust and confidence were reposed in an agent, his relation to his principal does not fall under any recognized class of trusts.

AGENCY AND PARTNERSHIP.—In the leading case of Cox v. Hickman, 9 C. B. N. S. 47, 99 E. C. L. 47, 8 H. L. Cas. 268, 11 Eng. Reprint, 431, 7 Jur. N. S. 105, 30 L. J. C. P. 125, 3 L. T. Rep. N. S. 185, 8 Wy. R. 754 (1860), it was laid down by Lord Wensleydale that the law of partnership was a branch of the law of principal and agent. And the most certain test of partnership is, not the sharing of profits, but the authority of each partner to act as principal for himself and as agent for the other partners. Per Cooley, J., in Beecher v. Bush, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465 (1881). But the ordinary agent is, of course, not a partner. It has sometimes been urged that he becomes one if it is the agreement that he is to share in the profits of the enterprise. That is undoubtedly true, if he becomes himself a principal; but he may still remain a mere agent, provided he acts only for others in the enterprise, and as compensation for his services receives a share of the profits. The question is one of intent, to be gathered, not from what the parties called the relation, but from the legal effect of the acts and contracts in the transaction. Ellsworth v. Pomeroy, 26 Ind. 158 (1866); Eastman v. Clark, 53 N. H. 276, 16 Am. Rep. 192 (1872) (a leading case); Parchen v. Anderson, 5 Mont. 438, 5 Pac. 588, 51 Am. Rep. 65 (1885) (collecting the authorities).

AGENT AND LESSEE.—An agent is sometimes put in charge of his principal's business under a so-called lease. Here, too, the legal result depends, not upon the names used by the parties, but upon the legal effect of their acts and agreements. If the "lessee" was merely acting in a representative capacity for the "lessor," the relation is one of agency. State v. Page, 1 Speers, 408, 40 Am. Dec. 608 (1843). If the lessee conducts a business on his own account, even though he pays as rent part of the profits, the relation is that of landlord and tenant. Beecher v. Bush, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465 (1881).

TAYLOR v. BURNS.

(Supreme Court of Arizona, 1904. 8 Ariz. 463, 76 Pac. 623, affirmed in 203 U. S. 120, 27 Sup. Ct. 40, 51 L. Ed. 116.)

Action to quiet title to three mining claims. Taylor based his claim on an agreement in which Burns "sells" to him the claims upon condition that, whenever he shall negotiate and sell them to any third persons, he shall pay to Burns $45,000 and one-eighth of any excess he may secure.

SLOAN, J.[1] [After stating the facts:] * * * The only question involved is the construction to be given the agreement between Taylor and Burns. The contention of the appellant is that the agreement amounted to a sale to him of the mines for a given and valid consideration expressed in the instrument. The contention of counsel for the appellees is that, from the instrument as a whole, it clearly amounts to nothing more than a power of attorney authorizing Taylor to negotiate the sale of the claims upon the terms stated in the agreement, revocable at will. Upon the latter contention, it was admitted by the appellant that, if the instrument was revocable at the will of Burns, such revocation was made by Burns on February 27, 1903.

It is a settled rule of construction of instruments of this character that the intention of the parties must govern, as this intention is evidenced by a consideration of the entire instrument. Williams v. Paine, 169 U. S. 76, 18 Sup. Ct. 279, 42 L. Ed. 658. "The elementary canon of interpretation is not that particular words may be isolatedly considered, but that the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them." O'Brien v. Miller, 168 U. S. 287, 18 Sup. Ct. 140, 42 L. Ed. 469.

Tested by this rule, the agreement cannot be construed as a conveyance. For a consideration, Burns agreed to sell upon certain terms and conditions expressed. These terms and conditions were that Taylor was empowered and authorized to sell and negotiate the mines for any price above $45,000; that, upon such sale being made, he should pay to Burns $45,000 of the purchase price, and one-eighth of the excess of the purchase price over and above $45,000, and that both parties should aid and assist each other in the negotiation and sale of the claims, in order that they might quickly be sold, and the consideration realized; and that further, upon said sale, Burns should execute any deed or deeds of conveyances that might be necessary to convey a good title to the purchaser or purchasers. It will be noted that Taylor was not obligated to pay any sum or sums of money whatever. There is nothing in the instrument which would permit a recovery by Burns against Taylor of any part of the purchase price.

[1] Part of the opinion is given on p. 225, post.

Upon no theory can the instrument be construed as a sale in præsenti. As an agreement to sell in futuro, it lacks the essential element of mutuality, in that Taylor was not obligated to pay the purchase price, or any part of it, or even to effect a sale. Again, the instrument expressly provides that, in case Taylor should effect a sale, the deed of conveyance should be made by Burns, which is an admission that the instrument was not to be construed as divesting Burns of his title, and that a conveyance from him would be necessary to vest his title in any purchaser. Not only does the contract fail to vest any title in Taylor, but it does not contemplate that Taylor should ever acquire the title. It merely provides that upon the contingency of a sale to another, brought about by his efforts or the joint efforts of himself and Burns, Taylor should share in the proceeds of such sale. Taking the instrument as a whole, it appears that it was intended merely as a power of attorney authorizing Taylor to effect a sale of the mines, upon the terms mentioned, as the agent of Burns. * * *

We hold, therefore, that the agreement did not confer any title to or estate in the mines in question upon Taylor, and that the findings and decree of the trial court are correct.

The judgment will be affirmed.[8]

SNELLING v. ARBUCKLE BROS.

(Supreme Court of Georgia, 1898. 104 Ga. 362, 30 S. E. 863.)

The case involved the construction of a contract which Arbuckle Bros. were accustomed to make with those who sold their coffees. The contract provided, among other things, that all goods consigned remain the property of the consignor until sold and paid for, the consignee holding as factor; that goods shall be sold only at the prices and terms fixed by the consignors; that the consignee guarantees the sale of all coffee consigned and payment therefor within 60 days; that he will remit such payment, whether the whole of the consignment is sold or not; and that the consignee assumes the risk of any fall in price and the benefit of any advance.

One Allen sold coffees under such a contract. Before paying for certain goods he became insolvent, and his assignee collected for the coffee so sold. Arbuckle Bros. sue the assignee to recover this money.

FISH, J.[9] The case turns upon the proper legal construction to be given to the written agreement or contract between Arbuckle Bros. and Allen. If, as contended by the defendants in error, the legal

[8] To the same effect are Lenz v. Harrison, 148 Ill. 598, 36 N. E. 567 (1893); Williams Mower & Reaper Co. v. Raynor, 38 Wis. 119 (1875); Dewes Brewery Co. v. Merritt, 82 Mich. 198, 46 N. W. 379, 9 L. R. A. 270 (1890); Norton v. Melick, 97 Iowa, 564, 66 N. W. 780 (1896).

[9] Part of the opinion is omitted.

effect of the paper in question is to create between the parties thereto the relation of principal and factor,—the latter selling the goods of the former under a del credere commission,—then Arbuckle Bros. are entitled to the funds in the hands of Allen's assignee, arising from accounts against customers to whom Allen had sold goods consigned to him by the Arbuckles. If, on the other hand, this paper, properly construed, rendered the relation of the parties that of vendor and purchaser, then Arbuckle Bros. were not entitled to the proceeds of these accounts. The contract is certainly a very extraordinary one, and contains seemingly contradictory provisions. Some of its stipulations, if construed only in connection with others of a kindred nature, seem to indicate the creation of a del credere agency. Other stipulations, taken in connection with those which readily harmonize with them, clearly show a contract of sale. It appears to have been drawn for the purpose of enabling Arbuckle Bros. to "run with the hare, or hold with the hounds," according as, in the exigencies of a given case, their interests might dictate,—on the one hand, to hold Allen absolutely bound, in any event, to pay for all goods shipped to him by the Arbuckles; on the other hand, in the event of his failure to pay and his insolvency, to enable them to successfully claim all unsold goods in Allen's possession, and the accounts, or their proceeds, against his customers, representing goods which he had sold, but for which he had not paid Arbuckle Bros.

The contract must be construed in the light of all of its provisions, and the legal outcome of its several stipulations, construed together, must control its classification. The mere name which may have been given to it by the parties thereto cannot change the legal effect of its stipulations. In Herryford v. Davis, 102 U. S. 235, 26 L. Ed. 160, the supreme court of the United States construed a written contract between a car manufacturing corporation and a railroad company to be a sale, notwithstanding the fact that the contract, in the language of the court, "industriously and repeatedly spoke of loaning the cars to the railroad company for hire for four months, and delivering them for use for hire." Mr. Justice Strong, delivering the opinion of the court, said: "What, then, is the true construction of the contract? The answer to this question is not to be found in any name which the parties may have given to the instrument, and not alone in any particular provisions it contains, disconnected from all others, but in the ruling intention of the parties, gathered from all the language they have used. It is the legal effect of the whole which is to be sought for. The form of the instrument is of little account." See, also, Hays v. Jordan, 85 Ga. 741, 11 S. E. 833, 99 L. R. A. 373; Cowan v. Manufacturing Co., 92 Tenn. 376, 21 S. W. 663; Manufacturing Co. v. Cole, 4 Lea, 439, 40 Am. Rep. 20.

Under the fifth clause of this contract, Allen was bound to remit to Arbuckle Bros., at fixed times, the full price of each consignment,

without regard to payments made to him by the customers to whom he sold the goods, or the terms upon which he sold to such customers, and without regard to whether any sales had been made by him or not; and he was bound, at such fixed times, to remit to the Arbuckles at a price fixed by them to him at the time when the goods were consigned to him. Allen's obligation, then, was radically different from that of a mere del credere agent; for he did not simply guaranty to Arbuckle Bros. that the customers to whom he sold their goods on a credit should pay them, through him, as their agent, the price for which the goods were sold to such purchasers, but he agreed, at the expiration of 60 days from each consignment, to remit to Arbuckle Bros. full payment for the entire consignment, regardless of the question whether the goods of which such consignment consisted had been sold by him or not. If none of the goods of such consignment had been sold by Allen, he was just as much obligated to pay Arbuckle Bros. for them, at a price fixed by the latter at the time of the consignment, as he would have been if he had in fact sold all of the goods contained in the consignment. In keeping with, and as if to emphasize, this clause of the agreement, the tenth clause expressly stipulated that if, at the expiration of 60 days, Allen had not paid for the goods, the Arbuckles should have the right to draw on him for the price of the same. What stronger feature of a sale on 60 days' time can there be than a stipulation which renders the consignee, from the moment the goods are received by him, absolutely and unconditionally bound at the end of that time to pay for them, and to pay for them at a price fixed at the time they are consigned?

As if the provisions which we have just been discussing were not enough to hold Allen bound, under any and all circumstances, to pay for the goods at the price fixed when they were consigned to him, the sixth clause provided that he was to insure Arbuckle Bros. against any decline in the price of the goods. So, if the market price fell, the loss was Allen's, and not that of the Arbuckles. And, as if to balance this provision, the seventh clause provided that, if the goods advanced in price, Allen was to have the benefit of such advance. So, if the market price rose, the profit was Allen's, and not that of Arbuckle Bros. Why should Allen assume the risk of any decline in the price or market value of the goods, if the goods belonged to Arbuckle Bros.? Why should he be entitled to the benefit of any increase in the price or value of the goods, if they did not belong to him? Why should he be compelled to pay for the goods at the end of 60 days, whether he had sold them or not, if he was simply an agent to sell the goods for the consignors? These earmarks indicate a sale, and, taking them together, it is very difficult, notwithstanding the apparently conflicting provisions of the instrument, to escape the conclusion that such is the legal effect of this contract.

When we further consider that no account of sales was to be rendered by the so-called "factor" to his alleged principals; that he was not required to furnish to them the names of the parties to whom he sold upon a credit, and the terms of the credit which he extended, nor to report or transmit to them the evidences of indebtedness, if any, which he received from such customers; that, no matter how much cash he might accumulate from sales within the 60 days, he was under no obligation to remit it to them until the 60 days had elapsed, and then was bound to remit not simply as a del credere agent accounting to his principals for the money of such principals in his hands, and for the amount of matured indebtedness against customers who had failed to meet their obligations, but to remit the whole amount of the entire consignment; and that discounts, such as are usual in cases of sales upon time, were to be allowed upon all bills paid before the expiration of 60 days from their dates,—the conclusion seems unavoidable that the true legal relation between the parties to this agreement was that of vendors and vendee. The stipulation that the title to the goods should remain in the Arbuckles until Allen had sold them is not inconsistent with a contract of sale. It might make the sale, as between the parties, to that extent conditional. The seller of personal property often stipulates that the title thereto shall remain in him until the purchase price is paid. As Allen wanted the goods for the purpose of reselling them at retail to his customers, if the stipulation had gone to this extent it would have seriously hampered his business, and caused him to lose the benefit of the 60-days' credit extended to him.

The stipulation in question may therefore be treated as simply an effort on the part of the vendors to retain the title until the vendee had either sold the goods or paid for them; the retention of title, by express provision, ceasing when he sold the goods, and by necessary implication ceasing when he paid for them. Nor is the fact that Allen was to sell the goods at prices fixed by Arbuckle Bros. necessarily inconsistent with the idea of a sale. It is not very uncommon in these times for the manufacturer of a certain article to endeavor to fix the price at which it shall be sold at retail by the merchants who purchase it for that purpose. This effort on the part of the manufacturer is doubtless for the purpose of establishing a uniform price, applicable to all markets, and to prevent competition between the retailers.

Coming now to stipulations and expressions which really seem to conflict with the idea of a sale, how futile to call the instrument in question a "special selling factor appointment," and, in its opening sentence, to "appoint" Allen a "special selling factor," when under its provisions he is bound as a purchaser? Of what avail was it to introduce provisions which, taken by themselves, indicate the creation of a del credere agency, and yet to bind the so-called "factor" to pay for the goods, whether he ever sold them or not? Of what use was it to declare in one clause that Allen should never become a purchaser of

the goods consigned to him, when in a subsequent clause it was stipulated that he should pay for them, at the end of 60 days, at a price fixed at the time of the consignment? The latter clause annihilates the former. As is well said by Mr. Justice Strong in Herryford v. Davis, supra, "It is quite unmeaning for parties to a contract to say it shall not amount to a sale, when it contains every element of a sale, and transmission of ownership."

Probably the leading case among cases of this character is that of Ex parte White, 6 Ch. App. 397. In that case there was no written contract, but the course of dealing between the parties showed that Towle & Co., who were cotton manufacturers, consigned goods of their manufacture to Alfred Nevill, accompanied by a price list, and he sent them monthly an account of the goods which he had sold, debiting himself with the price specified in the price list, not specifying the particular contracts, nor giving the names of the purchasers, nor the price at which, nor the terms on which, he had sold the goods; and in the next month he paid to Towle & Co. the moneys which were due to them in respect of the sales thus accounted for. He frequently had the goods bleached or dyed before he sold them, but gave no account to Towle & Co. of the expense. In discussing the nature of the relation between the parties under this course of dealing, James, L. J., said: "The case seems very analogous to one suggested by Mr. De Gex in the course of the argument. If a publisher publishes for an author, and sells for the author, and holds all the copies of the book, and at some specified time has to return to the author an account of all those sold, and pay for them at a price fixed between the author and the publisher, the publisher being at liberty to make his own bargains with retail booksellers all over the country, it could never be supposed that the relation of creditor and debtor or vendor and purchaser ever existed between the author and the retail booksellers. I have not the slightest doubt that a great quantity of 'agency business' is carried on in the same way in the country, and that there are large dealers who have agents in all the towns of Great Britain and Ireland. Possibly they may say: 'We will give you the goods. You shall be the sole person whom we supply in a particular district, and we shall not call upon you to pay until you have disposed of them. You are at liberty to sell upon your own terms. We have nothing to do with the persons with whom you deal, but we look to you to pay at our trade prices for the goods you sell. You must return the sales that you have made up to certain times. We will give you a certain credit, but when that has expired we look to you to pay us the cash.' That is a very reasonable bargain, and that is the kind of bargain which, in my opinion, the course of dealing shows to have existed in this case; and, if so, how is it possible to say that the proceeds of the sales were trust moneys in the hands of Mr. Nevill? Mr. Nevill

was not to pay immediately, and if he sold for cash, it seems to me impossible that Towle & Co. could have any right to say: 'You have sold the goods for cash. Therefore hand over the moneys to us at once.' Nevill would have said: 'No; the bargain between us is that I am to give you an account at the end of the month, and to pay you at the end of another month. My selling for hard cash does not alter the nature of the bargain between you and me, or entitle you to call upon me to hand the moneys over to you, or to put the moneys in medio and keep them for you.' The proceeds of sale were his own moneys, and not trust moneys, and he was at liberty to deposit them with a banker, or deal with them as he pleased."

How aptly the lord justice's illustration of the impossibility of the existence of any right in Towle & Co. to demand the proceeds of cash sales from Nevill applies in the case at bar! To such demand upon the part of Arbuckle Bros., Allen could have replied: "No; under the bargain between us, I am not to give you any account of sales at all; I am simply to pay you for the goods at the end of sixty days. 'My selling for hard cash does not alter the nature of the bargain between you and me, or entitle you to call upon me to hand the moneys over to you, or to put the moneys in medio and keep them for you.'" In the same case from which we have quoted, Mellish, L. J., said: "It is quite clear that Nevill, if he sold these goods, was to pay Towle & Co. for them, at a fixed price,—that is to say, a price fixed beforehand between him and them,—and at a fixed time. Now, if it had been his duty to sell to his customers at that price, and to receive payment for them at that time, then the course of dealing would be consistent with his being merely a del credere agent, because I apprehend that a del credere agent, like any other agent, is to sell according to the instructions of his principal, and to make such contracts as he is authorized to make for his principal; and he is distinguished from other agents simply in this: that he guaranties that those persons to whom he sells shall perform the contracts which he makes with them; and therefore if he sells at the price at which he is authorized by his principal to sell, and upon the credit he is authorized by his principal to give, and the customer pays him according to his contract, then, no doubt he is bound, like any other agent, as soon as he receives the money, to hand it over to the principal. But if the consignee is at liberty, according to the contract between him and the consignor, to sell at any price he likes, and receive payment at any time he likes, but he is bound, if he sells the goods, to pay the consignor for them at a fixed price and at a fixed time, in my opinion, whatever the parties may think, their relation is not that of principal and agent. The contract of sale which the alleged agent makes with his purchasers is not a contract made on account of his principal, for he is to pay a price which may be different, and at a time which may be different, from those fixed by the contract. He is not guarantying the performance.

by the persons to whom he sells, of their contract with him, which is the proper business of a del credere agent; but he is to undertake to pay a certain fixed price for those goods, wholly independent of what the contract may be which he makes with the person to whom he sells; and my opinion is that, in point of law, the alleged agent in such a case is making on his own account a contract of purchase with his alleged principal, and is again reselling." This decision was affirmed by the house of lords, sub nom. Towle v. White, 21 Wkly. Rep. 465.

We have quoted at some length from this case, because it has been regarded as very high authority by the courts in this country, and has been often cited and followed. While there were some features indicating a sale in that case which are not in the present one, we regard the features in this case which indicate a sale, taken all together, as being really stronger than those of a similar character in the case decided by the English court. We think that the single fact, in the case at bar, that Allen was bound to pay for all goods which he received from the Arbuckles, whether he ever sold them or not, outweighs any facts indicating a sale in that case which are not found in this one.[10] * * *

Judgment for plaintiffs below reversed.

GIBSON v. SNOW HARDWARE CO.

(Supreme Court of Alabama, 1891. 94 Ala. 346, 10 South. 304.)

Action against Mrs. Gibson on account for hardware sold upon the order of her son, John Brady, for use upon a building constructed for her by one Allen. The evidence showed that she had allowed him to purchase other material for her and that she had paid for it. Mrs. Gibson denied that he was her general agent, or was ever authorized to make the purchases for her.

McCLELLAN, J.[11] [after passing upon various questions of evidence and charges] held: * * * Nor was there error in excluding the

[10] In passing upon a similar contract in Arbuckle v. Gates, 95 Va. 802, 30 S. E. 496 (1898), the court said: "The agreement was an attempt to accomplish that which cannot be done: To make a sale of personal property, and at the same time to constitute the buyer simply an agent of the seller to hold the property until it is paid for. The two things are incompatible and cannot coexist. The agreement had in it every element of sale. It was, in substance and effect, a sale, and must be so declared. It does not matter by what name the parties chose to designate it. That does not determine its character. The courts look beyond mere names, and within, to see the real nature of an agreement, and determine from all its provisions taken together, and not from the name that has been given to it by the parties, or from some isolated provision, its legal character and effect." The court then reviewed and discriminated the principal cases on the subject. An elaborate discussion is also to be found in Arbuckle v. Kirkpatrick, 98 Tenn. 221, 39 S. W. 3, 36 L. R. A. 285, 60 Am. St. Rep. 854 (1897).

[11] Part of the opinion is omitted.

testimony of Mrs. Gibson to the effect that she had paid Allen for the material charged in the account sued on. That fact could exert no influence on this case in any aspect. If Brady was her agent, and had authority to bind her to the payment of the account to the J. Snow Hardware Company, palpably payment by her to Allen or anybody else would not avoid her liability to plaintiff; and, if Brady was not her agent, she would not be liable to plaintiff, whether she had paid to Allen or not. The inquiry was foreign to the case, and properly eliminated from it.

Agencies are of three classes,—universal, general, and special. "A universal agent is one authorized to transact all of the business of his principal of every kind; a general agent is one who is employed to transact all of the business of his principal of a particular kind or in a particular place; a special agent is one authorized to act only in a specific transaction." Mechem, Ag. § 6; 1 Amer. & Eng. Enc. Law, p. 348 et seq. "A special agency properly exists when there is a delegation of authority to do a special act." Story, Ag. § 17. "A special agent is one authorized to do one or two special things." 1 Ross, Cont. 41. "A special agent is appointed only for a particular purpose, and is invested with limited powers." Chit. Cont. 285.

In the case at bar there was not only the declaration of Brady that he was Mrs. Gibson's general agent, but other evidence from which the jury might have inferred that he represented her generally in making purchases, or, at least, that he was her agent for all purposes in respect of the opera-house, including the making of the contract with Allen, the purchasing of material, the supervision of the work, changing of plans and specifications, etc. This would, in our opinion, constitute him her general agent with respect to that enterprise, if the jury found the facts in line with these tendencies of the evidence, having authority to do, not "one or two special things," not "a single act" merely, but all acts necessary to the consummation of the enterprise in hand. And the court's charge to the jury at plaintiff's instance, that one who deals with a general agent is not bound to inquire as to the extent of his authority with respect to the matter of the agency, and that, "if the plaintiffs show that John Brady was Mrs. Gibson's general agent in building the opera-house, they [it] would have a right to deal with him in regard to matters connected with the opera-house, without inquiring the exact extent of his authority," was pertinent to the evidence adduced, and a correct exposition of the law applicable to it. Coffin Co. v. Stokes, 78 Ala. 372; Mechem, Ag. §§ 283–287.[12] * * *

Reversed for errors in admission of evidence.

[12] See, also, Pacific Biscuit Co. v. Dugger, 40 Or. 362, 67 Pac. 32 (1901), post, p. 342 and compare Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank, 16 N. Y. 125, 148, 69 Am. Dec. 678 (1857), post, p. 334, dissenting opinion of Comstock, J. For full discussion, see post, p. 342 ff.

GENERAL AND SPECIAL AGENTS.—It has often been said that the terms "gen-

eral" and "special" mark a difference in degree, rather than in kind, and that the distinction is not often clear. Most agents are general, but act more or less under special limitations upon their authority. See post, p. 342. In Springfield Engine Co. v. Kennedy, 7 Ind. App. 502, 34 N. E. 856 (1893), the court says: "The terms 'general agent' and 'special agent' are relative. An agent may have power to act for his principal in all matters. He is then strictly a general agent. He may have power to act for him in particular matters. He is then a special agent. But within the scope of such particular matters his power may be general, and with reference thereto he is a general agent." In discussing the question in Cross v. Atchison, T. & S. F. R. Co., 141 Mo. 132, 42 S. W. 675 (1897), the court said that the distinction in the books between general and special agencies was sometimes very unsatisfactory. It marks, not a diversity of the principles governing the principal's liability, but merely adjusts the actual measure of it. But compare Butler v. Maples, 9 Wall. 766, 19 L. Ed. 822 (1869), in which it was held that "the distinction between the two kinds of agencies is that the one is created by power given to do acts of a class, and the other by power to do individual acts only"; i. e., whether an agency is general or special is dependent on whether the agent is empowered to do acts of a class, or only individual acts, and it is quite independent of whether the authority is limited and restricted, or not.

UNIVERSAL AGENT.—It may well be doubted whether there is such a thing as a universal agent. In Wood v. McCain, 7 Ala. 800, 42 Am. Dec. 612 (1845), the court, in discussing the power of an agent, left in charge of his principal's business during the absence of his principal from the state, to assign his book accounts to a creditor, said, per Collier, C. J.: "The precise language employed in the bill of exceptions, is this: 'Stedman visited North Carolina and left Wm. A. Revis his general agent, or agent generally (said Revis having no written authority), to transact his business in this State; that he delivered up his books and accounts for medical services to said agent (including the account against garnishee) for settlement, and that said agency was advertised and generally known in the neighborhood.' It is supposed by the counsel for the plaintiff in error, that as Revis was the general agent of his principal, it must be presumed he was authorized to make the assignment in question. This conclusion is by no means a necessary sequence from the premises. General, are clearly distinguishable from universal agents, that is from such as may be appointed to do all the acts, which the principal can personally do, and which he may lawfully delegate the power to another to do. 'Such an universal agency may potentially exist; but it must be of the very rarest occurrence. And, indeed it is difficult,' says Mr. Justice Story, 'to conceive of the existence of such an agency, inasmuch as it would be to make such an agent the complete master, not merely dux facti, but dominus rerum, the complete disposer of all the rights and property of the principal.' Such an unusual authority will never be inferred from any general expressions, however broad, but the law will restrain them to the particular business of the party, in respect to which, it is presumed, his intention to delegate the authority was principally directed. Thus, if a merchant in view of his temporary absence, should delegate to an agent his full and entire authority to sell his personal property, to buy any property for him, or on his account, or to make any contracts, or to do any other acts whatsoever, which he could do if personally present—these general terms would be limited to buying or selling, connected with his ordinary business as a merchant; and without some more specific designation, would not be construed, to apply to a sale of his household furniture, or library, or the utensils, provisions, and other necessaries used in his family. Story's Ag. 20, 21. The difference between a general and special agent, is said to be this: The former is appointed to act in the affairs of his principal generally, and the latter to act concerning some particular object. In the former case, the principal will be bound by the acts of his agent, within the scope of the general authority conferred on him, although those acts are violative of his private instructions and directions. In the latter case, if the agent exceeds the special authority conferred on him, the principal is not bound by his acts. Id. 114; Paley on Ag. 199; Munn v. Commission Co., 15 Johns. 44, 54, 8 Am. Dec. 219."

Compare Gulick v. Grover, 33 N. J. Law, 463, 97 Am. Dec. 728 (1868) (in

CHAPTER II

THE PARTIES TO THE RELATION

SECTION 1.—WHO MAY ACT AS PRINCIPAL

CALEY v. MORGAN.

(Supreme Court of Indiana, 1887. 114 Ind. 350, 16 N. E. 790.)

Pl claimed land by virtue of a sale on a ft in favor of H assgd by one M acty as pltf of H. The pltf was not recorded. Held. This does not make it in valid as to ns to 3d pers that is reg? Now was re qd here so pltf was properly assgd?

Action by Caley to quiet title to forty acres of land of which he was in possession and claimed to be the owner. Cross-complaint by Morgan setting up claim of title and demanding that it be quieted. Caley claimed by conveyance direct from one Lucas; Morgan, upon a sheriff's sale antedating the conveyance to Caley, upon a judgment entered by confession by Lucas in favor of one Hendrix. This judgment was assigned to Morgan by one Milligan, acting under a power of attorney from Hendrix.

NIBLACK, J.[1] [After stating the facts and holding that the judgment by confession was effective and valid:] * * * It is next claimed that authority to assign a judgment cannot be conferred by a power of attorney, and that, at all events, the power of attorney from Hendrix to Milligan was inoperative, because it was not recorded in some record in the recorder's office of Huntington county. Any person capable of transacting his own business may appoint an agent to act in his behalf in all the ordinary affairs of life. In many cases the appointment may be by parol only, but may, in any case, be in writing. For some purposes the appointment must be by a letter or power of attorney, which makes the agent an attorney in fact. A person thus appointed, however, is none the less the mere agent of the person appointing him. Story, Ag. p. 2, § 3; Ewell's Evans, Ag. 1; Roehl v. Haumesser, 114 Ind. 311, 15 N. E. 345, (No. 13,062.) A power of attorney is valid as between the parties, and for all ordinary purposes, without being recorded. It is only when notice to third parties is requisite that the recording of a power of attorney becomes material. There was, consequently, nothing in the facts, as the court found them,

which a wife, having full authority for her husband in business matters, was held not to be a universal agent with power to indorse accommodation paper in his name), with Barr v. Schroeder, 32 Cal. 609 (1867) (which holds, though it was not necessary to a decision, that an agent having similar power as to his principal's property, was a universal agent).

[1] Part of the opinion is omitted.

which restrained Hendrix from constituting Milligan his attorney in fact to sell and assign his judgment against Lucas, or which invalidated Milligan's assignment of the judgment to Morgan. * * *

The judgment is affirmed, with costs.

DAVIS v. LANE.

(Superior Court of Judicature of New Hampshire, 1839. 10 N. H. 156.)

Plaintiff's intestate Foss held a note for $50 against Lane. Foss' wife had been his general agent, transacting all his business. On the day of his death, when he was wholly senseless and beyond hope of recovery, she gave this note to one Prescott, to whom deceased owed $46. Lane paid the note to Prescott, and the administrator now sues to recover the amount of the note.

PARKER, C. J.[2] * * * There is no pretence that a wife, as such, has any authority to dispose of the husband's goods, or adjust his affairs, by reason of his incapacity to transact business.

But it is contended, in this case, that the wife having had a general power to transact business for her husband previous to his illness, nothing but an express revocation of that power, or some occurrence which divests and transmits the property, as death, or bankruptcy, will terminate her authority to act as the agent of her husband, and that she therefore might well dispose of the note in question, notwithstanding her husband was utterly insensible and incapable of any volition whatever, and this well known to her and to Prescott, to whom she passed it, and notwithstanding he continued in that state until his decease.

The authorities show that the death of the constituent terminates the authority, unless the power is coupled with an interest so that it may be executed in the name of the agent. Harper v. Little, 2 Greenl. 18, 11 Am. Dec. 25; Hunt v. Rousmaniere's Admr., 2 Mason's R. 244, Fed. Cas. No. 6,898; Id., 8 Wheat. 174, 5 L. Ed. 589; Watson v. King, 4 Camp. 274; 2 Livermore on Agency, 302. So bankruptcy, on his part, operates as a revocation. Parker v. Smith, 16 East's R. 386. So marriage of a single woman terminates a power to confess a judgment in her behalf. Anonymous, 1 Salk. 399; 2 Livermore on Agency, 307.

In all these cases an end is put to the power of the principal to act; and, moreover, the operation of law transfers the estate, upon which the power might operate, to the custody and control of others. In this latter respect these cases are unlike the one before us; and no authority has been cited, or found, which will directly settle the present case.

[2] The rest of the opinion is on page 282.

We are of opinion, however, that the authority of the agent, where the agency is revocable, must cease, or be suspended, by an act of Providence depriving the constituent of all mind and ability to act for himself, and that this doctrine can be sustained by very satisfactory principles.

An authority to do an act, for, and in the name of, another, presupposes a power in the individual to do the act himself, if present. The act to be done is not the act of the agent, but the act of the principal; and the agent can do no act in the name of the principal which the principal might not himself do, if he were personally present. The principal is present by his representative, and the making or execution of the contract, or acknowledgment of a deed, is his act, or acknowledgment. * * *

MacFARLAND v. HEIM.

(Supreme Court of Missouri, 1894. 127 Mo. 327, 29 S. W. 1030, 48 Am. St. Rep. 629.)

Action against a guarantor of a lease of land belonging to Mrs. MacFarland, and described "as her general estate." Her husband had acted for her in making out the lease, and he and a janitor, Harding, for her had secured Heim's signature as guarantor of the lease. Judgment for defendant.

SHERWOOD, J.[3] [After passing upon the consideration for the guaranty and holding there had been no assumption by Heim of any legal liability:] * * * But the trial court erred in holding and instructing that Mrs. MacFarland (not being seised of an equitable separate estate) could have any agent, either in Harding or in her husband, to bind her by any act of theirs, or that she could ratify their void acts. A void act is incapable of ratification. It is impossible to understand what is meant by the words "general estate," of which it is said Mrs. MacFarland was seised. It suffices, for the present purpose, that it is stated in the record that it was not her "equitable separate estate."

It is among the fundamentals of the common law that a married woman is incapable of contracting, and her supposed contracts are void. This is still the law, except where statutory modifications have occurred. If thus incapable of contracting, then incapable, also, of authorizing another to contract for her; for this would be to make the stream rise higher than its fountain head. Story says: "* * * Every person, therefore, of full age, and not otherwise disabled, has a complete capacity for this purpose. But infants, married women, idiots, lunatics, and other persons not sui juris are either wholly or partially incapable of appointing an agent. Idiots, lunatics, and other persons not sui juris are wholly incapable; and infants and married

[3] Part of opinion is omitted.

women are incapable, except under special circumstances. * * * So in regard to married women, ordinarily, they are incapable of appointing an agent or attorney. * * * With regard to her separate property, she may, perhaps, be entitled to dispose of it, or to incumber it, through an agent or attorney, because in relation to such separate property she is generally treated as a feme sole. I say, 'perhaps'; for it may admit of question, and there do not seem to be any satisfactory authorities directly on the point." Story, Ag. (9th Ed.) § 6. A similar doubt has been elsewhere intimated. Weisbrod v. Railway Co., 18 Wis., loc. cit. 40, 86 Am. Dec. 743, and cases cited.

In this state, however, it has long been steadily maintained that a feme covert, as to her separate estate in equity, is a feme sole (Turner v. Shaw, 96 Mo., loc. cit. 28, 8 S. W. 897, 9 Am. St. Rep. 319, and cases cited); and therefore may charge her separate estate, and make an agent in regard thereto, to all intents and purposes as if she had never passed sub jugum matrimonii. But, where she is not thus seised, we have held, over and over again, that, not being sui juris, of course she could not appoint an agent. Wilcox v. Todd, 64 Mo. 388; Hall v. Callahan, 66 Mo. 316; Silvey v. Summer, 61 Mo. 253; Henry v. Sneed, 99 Mo. 407, 12 S. W. 663, 17 Am. St. Rep. 580; Flesh v. Lindsay, 115 Mo. 1, 21 S. W. 907, 37 Am. St. Rep. 374; Mueller v. Kaessmann, 84 Mo. 318.

Counsel for defendant, however, make citation of Mead v. Spalding, 94 Mo., loc. cit. 48, 6 S. W. 384, as asserting a contrary doctrine, and so it does, for it is there broadly asserted that "there can be no doubt but the husband may be the agent of the wife." The two cases cited from our own Reports do not sustain that position, because the first one was one where the land of the wife, the proceeds of which she brought suit for, was "her sole and separate property." Eystra v. Capelle, 61 Mo. 578. The second one cited is Rodgers v. Bank, 69 Mo. 560, where the subject of the suit was the wife's money acquired by her under the married woman's act of 1875 (section 3296, Rev. St. 1879). But that section authorizes the wife to appoint her husband as her agent for the disposition of her personal property, provided the authority be in writing, and we have expressly held that, in regard to that section, a married woman, respecting her personal property held under its provisions, is a feme sole. Blair v. Railroad Co., 89 Mo., loc. cit. 391, 1 S. W. 350. We therefore decline to follow the ruling in Mead v. Spalding.

On account of the reasons expressed in a prior part of this opinion, the error mentioned is a harmless one, and, when this is the case, such error in giving erroneous instructions constitutes no ground for reversal. Fitzgerald v. Barker, 96 Mo. loc. cit. 666, 10 S. W. 45, 9 Am. St. Rep. 375; Brobst v. Brock, 10 Wall. 519, 19 L. Ed. 1002. Therefore judgment affirmed. All concur.

WILLIAMS v. SAPIEHA.

(Supreme Court of Texas, 1901. 94 Tex. 430, 61 S. W. 115.)

P/a of imbecile
(Dec as to p/a of infant)

BROWN, J. The Court of Civil Appeals for the First District has certified to this court the following statement and questions:

"In this cause, now pending before this court on motion for rehearing, we respectfully certify for your decision the questions hereinafter set out. The facts are as follows:

"T. D. Mason, by his guardian, brought this suit to remove cloud from his title to certain lands, alleging title in himself. The instruments which are alleged to constitute the cloud are a power of attorney purporting to have been executed by T. D. Mason to one J. W. Tolson, and a deed from Tolson to the appellee, Sapieha, conveying the land in question. Mason seeks to have both annulled on the ground that he was an imbecile at the date of their execution. Mason acquired the land through the will of his deceased grandfather, the tract being devised to him and his brother, D. O. Mason, as tenants in common. On 6th day of July, 1878, T. D. Mason executed and delivered to J. W. Tolson a power of attorney, whereby Tolson was authorized, as his attorney in fact, to sell his interest in the land, and to make a deed to the purchaser. This instrument was duly signed and acknowledged by him, and was promptly placed of record in the county where the land was situated. On the 19th day of March, 1879, Tolson, as such attorney in fact, executed and delivered to the appellee, Sapieha, a deed conveying the entire tract of land; D. O. Mason, the brother of T. D. Mason, joining in such deed, and thereby conveying his interest also. Appellee paid a fair and adequate price for the land, the deed reciting the amount, and its payment, and the transaction was in all respects fair and open. At the date of the execution of the power of attorney, T. D. Mason was about 35 years old, and the undisputed evidence shows that he was at that time, had been from his birth, and was at the date of the trial, an imbecile, without mental capacity to manage his affairs, and that on that account he was without mental capacity to contract at the dates of the two instruments above named. Sapieha had no knowledge or notice of Mason's mental condition, and dealt with Tolson without knowledge of any fact which should have led him to inquire as to the mental condition of T. D. Mason. T. D. Mason had never been under guardianship at the date of these transactions, and had never been judicially declared of unsound mind. A guardian was first appointed for him in 1891.

"In the absence of opposing testimony, we find, as did the trial court, that T. D. Mason received the consideration paid by Sapieha for his interest in the land. Wade v. Love, 69 Tex. 524, 7 S. W. 225. Notwithstanding the pleadings of appellant set up the power of attorney and deed which he assails, no offer is made to return the

consideration, nor was it shown that the appellee could be placed in statu quo.

"The questions propounded are: (1) Is the power of attorney from T. D. Mason to Tolson void as against the appellee, the principal being non compos mentis at the date of its execution? (2) If only voidable, will the appellant be permitted to rescind the power of attorney and deed made in pursuance thereof, in the absence of an offer to return the purchase price, or otherwise place the purchaser in statu quo?

"In disposing of this appeal this court, in view of expressions in Cummings v. Powell, 8 Tex. 81; Askey v. Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176, and other Texas cases, treated the deed to Sapieha as if it had been made by Mason in person; and held the power of attorney, as well as the deed, voidable only. The question seems not to have been directly decided in this state, and we therefore certify the above questions. Your attention is called to valuable notes in 16 Eng. Rul. Cas. 735, 6 Eng. Rul. Cas. 54, and Swafford v. Ferguson, 3 Lea, 292, 31 Am. Rep. 639. Sapieha, being a nonresident of the United States, was cited by publication, and, not appearing either in person or by attorney, the trial court appointed an attorney to represent the nonresident.

"Judgment being rendered in Sapieha's favor, a fee was allowed him for his services, which was taxed as costs against the plaintiff. Question: Was it lawful to tax such fee against the plaintiff in a suit of this character?"

To the first question we answer, the power of attorney mentioned in this question was voidable, but not void. Elston v. Jasper, 45 Tex. 409; Askey v. Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176; Ferguson v. Railway Co., 73 Tex. 344, 11 S. W. 347; Cummings v. Powell, 8 Tex. 81. The deed of an insane person is not void, but, like that of an infant, is voidable, at the election of the party. Irvine v. Irvine, 9 Wall. 626, 19 L. Ed. 800. We believe that this doctrine is not now seriously controverted in the courts of this country. We can see no difference in principle between the act of making a deed which passes the title and making an instrument which authorizes another person to do the same thing. In this state the powers of persons over real and personal property are so nearly the same that no distinction can be said to exist in the capacity required for making a sale and transfer of the one or the other. The law provides different methods of executing the will of the party, but places no greater restriction upon the power to sell the one than the other. It has been held upon sound reasoning that a lunatic or an infant may make a power of attorney by which simple contracts might be entered into for them; such as the signing of notes, or the indorsement and transfer of commercial paper. Whitney v. Dutch, 14 Mass. 457, 7 Am. Dec. 229; Hastings v. Dollarhide, 24 Cal. 195; Hardy v. Waters, 38 Me. 450.

In the case of Whitney v. Dutch, cited above, a partnership was

formed between an adult and a minor, and in the course of the business the adult partner executed a note in the firm name. When the minor became of age he ratified the note, but when suit was brought upon it he pleaded his infancy, and claimed that the note was void, and not subject to ratification. The supreme court of Massachusetts held that the note was voidable, and that it, having been ratified by the minor after reaching his majority, was a valid claim against him. That court said: "Then, upon principle, what difference can there be between the ratification of a contract made by the infant himself and one made by another acting under a parol authority from him? And why may not the ratification apply to the authority as well as to the contract made under it? It may be said that minors may be exposed if they may delegate power over their property or credit to another. But they will be as much exposed by the power to make such contracts themselves, and more, for the person delegated will generally have more experience in business than the minor. And it is a sufficient security against the danger from both these sources that infants cannot be prejudiced, for the contracts are in neither case binding, unless, when arrived at legal competency, they voluntarily and deliberately give effect to the contract so made. And in such case justice requires that they should be compelled to perform them." In the cases of Hardy v. Waters and Hastings v. Dollarhide, before cited, the issue was upon the validity of the transfer of a promissory note made by the agent of the payee, who was a minor; and it was claimed that the transfer was void because the minor could not confer power upon another to transact such business for him. In each of the cases, however, the court held the transfer good when ratified by the minor after arriving at majority. In other words, the court held the power of attorney to be voidable, and the act, being ratified, became valid, just as if it had been done by the infant himself.

The Supreme Court of this state in the case of Cummings v. Powell intimated very strongly the opinion that a power of attorney executed by an infant or a lunatic authorizing the sale and conveyance of real estate was merely voidable; but the question was not involved, and the opinion is not authority. In the case of Ferguson v. Railway Co. the court did in fact decide that the power of attorney given by an infant was voidable only. The question was in the case, a proper subject for its decision, but in the close of the opinion the court placed the decision upon another question. In Askey v. Williams the defendant, a minor, employed an attorney to defend him against a criminal charge, and to secure the fee gave a note with a deed of trust upon land containing a power of sale. The debt being unpaid, the trustee sold the land to pay the note, and in suit for the land the validity of the sale was in issue. It was held that the deed of trust which contained the power of sale was voidable; that the sale made by the trustee under the power was subject to be avoided by the minor, just as if the deed

had been executed by the minor in person. We regard this case as directly in point, and as deciding the very question presented. It is true that in the course of the opinion Judge Gaines remarked that powers given by a minor, when coupled with an interest, were held to be voidable; but the opinion is not placed upon that ground. The following language of the court shows that the power was sustained as if it had been a deed, placing them upon the same basis: "If the infant had conveyed the land absolutely as a fee, his deed would not have been void, but he could have avoided it within a reasonable time after coming of full age upon payment of a just compensation for the services rendered by his grantee. We think the same rule should apply in this case."

The contention of the appellant that the power of attorney and the deed made under it which are involved in this controversy are absolutely void because the maker of the power of attorney was at the time a lunatic is supported by the greater number of adjudicated cases. It is the doctrine of the English courts, and has been followed in the supreme court of the United States and by the supreme courts of a number of the states without questioning the soundness upon which it is based, or its consistency with the system of laws under which property rights are held in this country. Of the cases which sustain this rule we cite the following: Dexter v. Hall, 15 Wall. 9, 21 L. Ed. 73; Philpot v. Bingham, 55 Ala. 435; Armitage v. Widoe, 36 Mich. 124; Fetrow v. Wiseman, 40 Ind. 148; Lawrence's Lessee v. McArter, 10 Ohio, 37; Fonder v. Van Horne, 15 Wend. 631, 30 Am. Dec. 77; Pyle v. Cravens, 4 Litt. 17. In Dexter v. Hall, cited above, the supreme court of the United States reviews at length the English cases, and criticises the doctrine that the contracts of infants and lunatics are voidable only; finally basing its judgment upon the proposition that contracts made by infants and lunatics, and not delivered by the hand of the maker, are void. We quote the following to show the basis of that opinion: "The doctrine that a lunatic's power of attorney is void finds confirmation in the analogy there is between the situation and acts of infants and lunatics. Both classes of persons are regarded as under the protection of the law. * * * Yet it is universally held, as laid down by Lord Mansfield in Zouch v. Parsons, 3 Burrows, 1804, that deeds of an infant which do not take effect by delivery of his hand (in which class he places a letter of attorney) are void. We are not aware that any different rule exists in England or in this country." In the same court, the same judge, Justice Strong, delivered an opinion in the case of Irvine v. Irvine, 9 Wall. 617, 19 L. Ed. 800, which involved the validity of a sale made under power contained in a mortgage, in which case that court held that the sale was voidable; saying: "Whatever may have been the doubts once entertained, it has long been settled that the deed of an infant, being

an executed contract, is only voidable at his election; that it is not void. It operates to transmit the title."

The ablest judges who have dealt with this question have not undertaken to sustain by reason the rule adopted by the supreme court of the United States. In the case of Armitage v. Widoe, before cited, Judge Cooley said: "On the authorities, no rule is clearer than that an infant cannot empower an agent or attorney to act for him." And that able judge contented himself with a citation of authorities in support of a rule for which he could assign no sound reason. In Philpot v. Bingham, before cited, Judge Stone, of the supreme court of Alabama, said of this question: "From such an array of authorities, sanctioned as the principle has been by this court, we do not feel at liberty to depart, although the argument in favor of the exception is rather specious than solid. We therefore hold that the power of attorney under which the plaintiff's land was sold, made, as it appears to have been, while he was an infant, was and is what the law denominates void." In the case of Fetrow v. Wiseman, above cited, the supreme court of Indiana, after having stated the proposition, said: "The proposition may not be founded in solid reason, but it is so held by all the authorities." These are fair samples of the cases which uphold the doctrine that the power of attorney of an infant or a lunatic is absolutely void. The fundamental principle of the cases in which the doctrine originated is wholly absent from and at variance with our system of laws, and we feel that the strong reasoning of Judge Hemphill in Cummings v. Powell, and the qualified decision in Ferguson v. Railway Co., supported by the later case of Askey v. Williams, furnish a safer guide by which to regulate the property rights of the people of this country, and are more in harmony with our system of laws. We therefore follow them in preference to the arbitrary rule asserted in the greater number of decisions upon that question.[4] * * * [The answers to the second and third questions are omitted.]

[4] The above case cites the leading cases holding a lunatic's power of attorney absolutely void. But see, also, Trueblood v. Trueblood, 8 Ind. 195, 65 Am. Dec. 756 (1856); Turner v. Bondalier, 81 Mo. App. 582 (1888), and note to 1 Am. Lead. Cas. 247. The following may be added as holding a power by an insane person voidable merely, at the option of the principal when he reaches a lucid period, or valid, so far as to save the rights of third persons "who, before the insanity intervened, became interested in the power by reason of a consideration advanced, or who, in ignorance of the incapacity, and in good faith, parted with a consideration of value, relying on the apparent authority of the agent." Matthiessen & Weichers Refining Co. v. McMahon, Adm'r, 38 N. J. Law, 536 (1876); Blinn v. Schwarz, 177 N. Y. 252, 69 N. E. 542, 101 Am. St. Rep. 806 (1904), affirming 63 App. Div. 25, 71 N. Y. Supp. 343 (1901).

That an infant's power of attorney is voidable merely, and not void, is maintained in Simpson v. Prudential Ins. Co., 184 Mass. 348, 68 N. E. 673, 63 L. R. A. 741, 100 Am. St. Rep. 560 (1903). See, also, Hardy v. Waters, 38 Me. 450 (1853); Patterson v. Lippincott, 47 N. J. Law, 457, 1 Atl. 506, 54 Am. Rep. 178 (1885), and extended note in 18 Am. St. Rep. 629.

SECTION 2.—WHO MAY ACT AS AGENT

KING v. BELLORD.

(High Court of Chancery, 1863. 1 Hem. & M. 343, 32 L. J. Ch. 646, 8 L. T. Rep. N. S. 633, 2 New Rep. 442, 11 Wkly. Rep. 900, 71 Eng. Reprint, 149.)

Vice Chancellor Sir W. PAGE WOOD. The point raised in this case, though not covered by express decision, seems to fall within the general rule that an infant is incapable of entering into a binding contract. The actual contest arises thus: A testator having chosen to devise estates, upon trusts requiring discretion as to the expediency, as to the time, and as to the manner of a sale, to three persons, one of whom is an infant, the question is, whether a contract for sale entered into by those three trustees is a valid contract, which this court can specifically perform. There are numerous authorities which approach this question, but none which decide it. All of them are distinguished from this case by the well-known difference between power and property, a marked distinction which has been invariably upheld.

There can be no doubt upon the authorities from the earliest times, that if a man, by his will, gives an infant a simple power of sale without an interest, the infant may exercise it. All the decisions on the subject are referred to by Lord St. Leonards in his work on "Powers," and I need not discuss them minutely. They all turn on the execution of powers; and there is not a single authority upon the question whether an infant can sell an estate devised to him upon trust for sale. There is an opinion of Mr. Preston's, mentioned without disapproval by Lord St. Leonards, that an infant can exercise a power even though it be coupled with an interest; but this is very different from selling an estate vested in the infant by a devise in fee.

It is to be observed, that all the cases relied on with reference to powers, have gone upon the principle that the infant, in executing the power, is a mere conduit-pipe, as it has been termed, of the will of the donor of the power; so that when the estate is created, the infant (as was said in the case in Bridgman) is merely the instrument by whose hands the testator or donor acts. The donor, it is said, may use any hand, however weak, to carry out his intentions. This principle fails altogether to reach the case of a devise in trust to an infant.

It is not in the power of a testator to confer upon an infant a capacity in himself which the law does not give him, although he may make the infant his hand, his agent, to execute his purpose. He cannot give an estate to an infant and say that he may sell it, when the

law says that he cannot do so. It is unfortunate that the testator should have selected an infant as a trustee; but the inconvenience arising from this circumstance in the particular case, is not to be compared with that which would result from holding an infant to have a capacity to sell, which the law denies him. If the defendants still adhere to the offer made by them before the litigation, I shall dismiss the bill with costs.[5]

[5] In Lyon v. Kent, 45 Ala. 656 (1871), it is said: "Any one, except a lunatic, an imbecile, or child of tender years, may be an agent for another." The court approves Story on Agency, §§ 6, 7, 9, to the effect that monks, infants, femes covert, persons attainted, outlawed, or excommunicated, villains and aliens, may be agents for others. If the principal is willing to intrust the business to an infant and third persons consent to deal with him, they cannot later object to his incapacity. Cameron v. Ward, 22 Ga. 168 (1857). While the infant agent may bind his principal, the infant himself, of course, will in no way incur contractual liability thereby, either to his principal or to third persons. Talbot v. Bowen, 1 A. K. Marsh. 436, 10 Am. Dec. 747 (1819). See, also, ante, p. 143 (infant as agent of parent).

CHAPTER III

THE PURPOSES OF THE RELATION

SECTION 1.—IN GENERAL

SILVERWOOD v. LATROBE et al.

(Court of Appeals of Maryland, 1888. 68 Md. 620, 13 Atl. 161.)

Bill of complaint by appellant for an injunction to restrain the board of managers and superintendent of a cemetery company from interfering with appellant's right by obstructing or denying to his agents free access to a lot in the cemetery which he owned. The company had adopted a by-law prohibiting any person, other than a lot holder or a member of his or her family, from doing any work in the cemetery, except by a permit from the superintendent. From a judgment denying relief plaintiff appeals.

YELLOTT, J.[1] [After stating the facts:] * * * Nothing is clearer than that if a man, in the transaction of his own business, has a right to do any act, he can perform it by the hands of his agent. The general maxim, as old as our system of jurisprudence, is that whatever a man sui juris may do of himself, he may do by another. Co. Litt. 258. Had not this principle been always recognized, it is difficult to perceive how the multiform transactions of mankind could have been successfully conducted. The maxim, "qui facit per alium facit per se," carries with it, by implication, a recognition of the right of every man, unless exercising certain delegated powers, and acting in a fiduciary capacity, to employ an agent in the transaction of his business. Therefore, when, by the terms of a deed or other instrument, a man has a right to do a certain thing, he can do it either with his own hands or by the hands of an agent, and if the agent is interfered with by the grantor it is an interference with the rights of the grantee. When burying lots in a cemetery have been conveyed by a corporation, a right of property is conferred on the purchaser which is like any other right to real estate. Windt v. Church, 4 Sandf. Ch. 471. Unlike the Case of Partridge, 39 Md. 631, the appellant has a title to the lot by virtue of an instrument of writing, under seal, which operates as a deed of conveyance. The act of 1837 declares the property thus acquired to be

[1] Part of the opinion is omitted.

real estate. The grantee has a qualified fee limited to the purposes of sepulture.

The second clause of the instrument, conveying the property, gives him the right to plant and cultivate trees, shrubs, and flowers. This he could do either with his own hands or by employing an agent to do the work for him. When he accepted the deed, and paid the purchase money, he acquired this right. Had he been unable to secure the right, it is possible, and even probable, that he would not have purchased the property. No order subsequently passed by the grantors can be so construed as to have a retroactive operation, and thus limit or annul the privilege secured to the grantee by a solemn instrument under seal. As said by Alderson, J.: "When the law allows a party to contract, it will not permit that contract, by any matter arising ex post facto, to be made of no value." Giles v. Grover, 1 Clark & F. 106.

In Ashby v. Harris, L. R. 3 C. P. 523, this very question was decided. The burial board of the parish of St. Pancras, being a corporation, had granted, by an instrument under seal, the privilege of making and constructing a private grave, and the exclusive right of burial and interment therein. The grantee had been accustomed to plant and cultivate flowers by the hands of agents. Ten years after the grant had been made, the board determined to undertake the planting of graves themselves, and the superintendent was authorized to prevent other persons from entering the cemetery for such purpose. Notice was also given to the owners of private graves of the determination of the board. After such notice had been given, Harris, as the agent of the grantee, entered for the purpose of planting the grave conveyed by the said instrument under seal. He was assaulted, and an action for damages was instituted. It was held that "the board clearly had no right to make regulations to interfere with that which they had granted in perpetuity;" that "any subsequent regulations made by them would be repugnant and void. They might make general rules and regulations for the management of the cemetery, but not special rules which would derogate from prior grants."

It is clear that the court below committed an error in refusing to grant the relief asked for in the bill of complaint, and its decree should therefore be reversed. Decree reversed and cause remanded.

BRYAN and MILLER, JJ., dissent.

SECTION 2.—EXCEPTIONS.

COMBE'S CASE.

(Court of Common Pleas, 1613. 9 Coke, 75a, 77 English Reprint, 843.)

In replevin by William Atlee, against Daniel Banks and Thomas Osborn of taking of his cattle at Harmonsworth, in a place called Walnut-Tree Close, in the county of Middlesex, &c. Which plea began Trin. 8 Jac. Reg. Rot. 330. Upon the pleading, and issue joined, and special verdict given, the case was such. Thomas Combes copyholder in fee of ten acres of pasture in H. of the manor of Harmonsworth in the county of Middlesex, by his deed 22 November, 5 E. 6, constituted and ordained William Combes and Stephen Erlie two copyhold tenants of the same manor his lawful attornies, to surrender vice & nomine suo to the lord of the said manor, the said ten acres of pasture to the use of John Nicholas and his heirs, and afterwards at a court held of the said manor 8 Julii anno 6 E. 6, the said attornies tunc tenentes dom' per copiam Rot' Cur' in eadem Cur' ostenderunt scriptum præd' gerens dat' prædict' 22 Nov' anno 5, supradicto, et iidem Willielmus et Stephanus authoritate eis per præd' literam attornatus dat' in plena cur' sursum reddiderunt in manus dom' præd' decem acras pasturæ ad opus & usum præd' Johannis Nicholas hæredum et assignatorum suorum, who was at the same Court admitted accordingly; and that within the said manor there was not any custom to surrender copyhold land, &c. by letter of attorney either in Court or out of Court. And if the said surrender by letter of attorney of the said lands held by copy, &c. was good or not, was the doubt which the Jury referred to the consideration of the Court. And this case was argued at the bar, in Michaelmas, Hilary, and Easter Terms, and in this term, and in this it was also argued by the Justices at the Bench; and in this case two points were moved. 1. If a surrender could be made by force of the letter of attorney. 2. If the attornies had pursued their authority.

As to the first it was unanimously agreed by all the Judges in their several arguments, that the surrender in the case at bar made by letter of attorney, was good; and their reason was, because every copyholder having a customary estate of inheritance, may de communi jure, without any particular custom, surrender his lands held by copy in full Court, and therefore in pleading, the copyholder need not alledge a custom within the manor to surrender in Court; for that which is the usage per totam Angliam, is the common law as it is held in 34 H. 8, Br. Custom 59, & 34 H. 8, Dy. 54. Quod habetur consuetudo inter mercatores per totam Angliam, &c. is no good man-

ner of alledging a custom, for that is the common law; and in the Book of Entries, Tit. Tresp. Divisione Copyhold l. f. 568, no custom is alledged to enable a copyholder to surrender in full Court, no more than that a copyholder may make a lease for one year; because that he may do by the general custom of the realm, which is the common law, vide Bracton, lib. 2, c. 8. Then if a copyholder may surrender his estate in Court by the general custom of the realm, which is the common law, from thence it follows that he may do it by attorney, as a thing incident by the common law; and that will more clearly appear if the reason of such things which a man cannot do by attorney be well considered. And therefore if a man has a bare authority coupled with a trust, as executors have to sell land they cannot sell by attorney; but if a man has authority, as absolute owner of the land, there he may do it by attorney, as cestuy que use might after the statute of 1 R. 3, and before the statute of 27 H. 8, for cestuy que use had an absolute authority to dispose of the land at his will, without any confidence reposed in him, as appears in 11 Eliz. Dyer, 283, and there a judgment is cited in 25 H. 8, accordingly, against the opinion of some Judges in 9 H. 7, 24. But in the case at bar, the copyholder has a customary estate of inheritance, and not an authority or power only. Also there is a difference betwixt a general absolute power and authority as owner of the land, as aforesaid, and a particular power and authority (by him who has but a particular interest) to make leases for life or years. And therefore if A. be tenant for life, the remainder in tail, &c. and A. has power to make leases for 21 years rendering the ancient rent, &c. he cannot make a lease by letter of attorney by force of his power, because he has but a particular power which is personal to him; and so was it resolved in the case of the Lady Gresham at the assises in Suffolk in quadragesim' 24 El. by Wray and Anderson, Chief Justices, Justices of Assise there. Also there are some things personal, and so inseparably annexed to the person of a man, that he cannot do them by another, as doing of homage and fealty; so it is held in 33 E. 3, Trespass, 253, the lord may beat his villain for cause, or without cause, and the villain shall not have any remedy; but if the lord commands another to beat his villain without cause, he shall have an action of battery against him who beats him in such case. So if the lord distrains the cattle of his tenant, although nothing be behind, the tenant for the respect and duty which belong to the lord, shall not have trespass vi et armis against him; but if the lord commands his bailiff or servant in such case to distrain where nothing is behind, the tenant shall have an action of trespass vi et armis against the bailiff or servant. 2 H. 4, 4, a; 11 H. 4, 78, b; 1 H. 6, 6, a; 9 H. 7, 14, a.

Littleton in his chapter of Burgage holds, that where in a borough he who is seised of lands in fee may devise by custom, there the owner of such land may devise that his executors shall sell, which

they shall do as attornies to him, 3 E. 3, Coron. 310, by the custom of a manor a freehold will pass from one to another by surrender in Court, against the will of the lord, and where the custom is such, the tenant may do it by attorney, vide 14 H. 4, 1, a, by Hankford, & vide 19 Ass. p. 9.

And it was said, as he to whose use a surrender is made may be admitted by attorney, so a copyholder may surrender by attorney in full Court; and the case of him to whose use seems the stronger case; because he who is to be admitted is to do fealty, which none can do fealty but he who shall be admitted, and therefore in such case the lord may refuse to admit him by attorney; but if he admits him by attorney, it is good enough.

But Hil. 28 Eliz. in Chapman's Case it was held in the King's Bench, that where the custom of a manor is, that the copyholder out of Court may surrender into the hands of the lord of the manor by the hands of two customary tenants, who in effect are but instruments or attornies of the copyholder to take his surrender, that in such case the copyholder by his attorney cannot surrender into the hands of the lord by the hands of two copyhold tenants; for inasmuch as the surrender in such case ought to be warranted by the custom, the surrender without special custom to warrant it by attorney will not be good. Also that was upon the matter by attorney to make a surrender by others who are but attornies, for that is not warranted by the particular custom of the manor to make a surrender out of court. But in the case at bar the common law, and no particular custom, warrants the surrender, and therefore it may well be made according to the rule and reason of the common law by attorney. But it was resolved, that the attorney ought to pursue the manner and form of the surrender in all points according to the custom, as the copyholder himself ought to have done; as if the surrender by the custom ought to be by the rod, or by any other thing, or in any other manner, the attorney ought to pursue it. And the Chief Justice said, that the stile of a copyholder imports three things: 1. Nomen, his name. 2. Originem, his commencement. 3. Titul' his assurance: his name is tenant by copy of court-roll, for his name is not tenant by court-roll, but by copy of a court-roll, who is the sole tenant in law that holds by copy of any record, charter, deed, or any other thing. 2. His commencement, ad voluntatem domini; for at the beginning he was but tenant at the will of the lord. 3. His title or assurance secundum consuetudinem manerii, for the custom of the manor has fixed his estate, and assured the land to him so long as he doth his services and duties, and performs the customs of the manor. And therefore Danby saith in 7 E. 4, 19, a, that by the custom he is as well inheritable to have the land as tenant to hold his freehold by the common law. And it was resolved that this case was stronger, because the letter of attorney was made to those who were tenants by copy, &c. of the said manor. But it was

agreed, that where an infant at the age of fifteen years may make a feoffment that he cannot do it by attorney, because a custom which enables a person disabled by the law, ought to be pursued, and an infant can do nothing to pass any thing out of him by attorney: vide 11, H. 4, 33, a, and it would be hard, if men in prison, or sick, or beyond the sea, could not make surrenders of their lands held by copy for payment of their debts, or preferment and advancement of their wives and children, &c. Nota, reader, this is the first case that I have known which was adjudged in this point.

2. It was resolved, that when any has authority, as attorney, to do any act, he ought to do it in his name who gives the authority; for he appoints the attorney to be in his place, and to represent his person; and therefore the attorney cannot do it in his own name, nor as his proper act, but in the name, and as the act of him who gives the authority. And where it was objected, that in the case at bar, that the attornies have made the surrender in their own names; for the entry is Quod iidem Willielmus et Stephanus, &c. sursum reddiderunt &c. It was answered and resolved per totam curiam, that they have well pursued their authority; for first they showed their letter of attorney, and then they authoritate eis per præd' literam attornat' dat' sursum reddiderunt, &c. which is as much as to say, as if they had said, we as attornies of Thomas Combes surrender, &c. and both these ways are sufficient; as he who has a letter of attorney to deliver seisin saith, I as attorney to J. S. deliver you seisin; or I by force of a (this) letter of attorney deliver you seisin; and all that is well done and a good pursuance of his authority: but if attornies have power by writing to make leases by indenture for years, &c. they cannot make indentures in their own names, but in the name of him who gives them warrant. But if a man by his will in writing devises that his executors shall sell his land, and dies, there the executors in their own name may sell the land for necessity, because he who gives them authority by his will (which takes effect after his death) is dead; and yet in such case the vendee is *in* by the devisor.

LYON v. MITCHELL.

(Court of Appeals of New York, 1867. 36 N. Y. 235, 682, 93 Am. Dec. 502.)

Action upon an agency agreement with plaintiff's testator by which defendant agreed to pay him a commission of 10 per cent. of the sale of steamers to be sold by him as agent of defendant. The steamers were sold to the United States government and defendant refused to pay the commission.

HUNT, J.[2] [After deciding another point:] * * * The defendant insists also that the contract, as established by the evidence,

[2] Part of the opinion is omitted. Grover, J., dissented.

was in conflict with good morals and against public policy, and therefore void. The evidence showed that the defendant asked the plaintiff if he could sell those steamers. He replied that he did not know. Defendant said: "You are acquainted with the republican members of the administration?" The plaintiff replied that he was acquainted with some, and had friends who could introduce him to others, and who could aid him.

The defendant submitted to the court a series of propositions, which he requested him to charge, and under the fourth one of which, he desires to raise the present question.

That proposition commences in these words: "Any contract which conflicts with the morals of the time, and contravenes any established interest of society, is void, as being against public policy." It then asks the application of such principles to the present case. This is the only one of the requests looking to this subject.

The defendant I think had no right to ask a charge that "any contract which conflicts with the morals of the time," is void, as being against public policy. To make a contract thus void, it must be against sound morals. Morality is defined by Paley to be "that science which teaches men their duty, and the reason of it." Paley, Mor. Ph. b. 1. c. 2. "Morality is the rule which teaches us to live soberly and honestly. It hath four chief virtues, justice, prudence, temperance and fortitude." Bp. Horne's Works, vol. 6, charge to clergy of Norwich. To make a contract void on the principle claimed, it must be against morality as thus defined. The "morals of the time" may be vicious; public sentiment may be depraved; the people may have all gone astray, so that not one good man can be found. Sound morals, as taught by the wise men of antiquity, as confirmed by the precepts of the gospel, and as explained by Paley and Horne, are unchangeable. They are the same yesterday and to-day.

The proposition under consideration also contains a statement that a contract which "contravenes any established interest of society," is void, as being against public policy. This position is equally unsound, but I will not enlarge upon it.

My examination of this question upon the merits has also brought me to the conclusion that no valid objection can be made to the decision of the judge at the circuit.

The whole of the defendant's fourth request to charge, and upon which the question arises, is as follows: "Any contract which conflicts with the morals of the time, and contravenes any established interest of society, is void, as being against public policy. If the jury believe that the agreement on which this action is brought was made in reference to the influence of the plaintiff, or his friends, with the republican members of the administration, or with any persons connected with the administration, whose duty it was to act in the purchase of steamers, and the percentage as commissions was

fixed in reference to that influence, that the contract is void and no action can be sustained upon it."

The defendant and those concerned with him had these four steamers on hand. The coasting trade in which they had been employed was broken up by the inauguration of war at the south. Open war against the government of the United States had been commenced nearly a month before the date of this contract. The vessels were useless for the service in which they had been employed, and for the business in which the defendant was engaged. A deduction of ten per cent upon their value, or the payment of commissions to that amount was not an unreasonable inducement to a sale under such circumstances. No inference of corrupt intentions can therefore be drawn from the payment of a larger commission than was usually paid for the services of an agent or broker.

The proposition under consideration, it will also be observed, makes no reference to corrupt intentions on the part of the agent, or of pecuniary influences to be used by him, or secret service to be employed. It presents but a single point, namely, that if the fact that the plaintiff or his friends had influence with the administration, or with those whose duty it was to purchase steamers, was an inducement to the contract, then the contract is void.

Two classes of cases are cited in support of this proposition, viz.: Where a contract has been made to induce a particular legislative action, and where a contract has been made to procure appointments to office. Several cases of these classes are referred to in the recent case of Tool Co. v. Norris, 2 Wall. 45, 17 L. Ed. 868, and are cited with approval. Among them is Marshall v. Baltimore & Ohio R. Co., 16 How. 314, 14 L. Ed. 953, where the principle is laid down that all contracts for contingent compensation for obtaining legislation, or to use personal or secret or sinister influence on legislators, is void. That where an agent contracts to use or does use secret influences to affect legislative action, the contract respecting it is void. The learned judge in deciding the case says: "Public policy and sound morality do therefore imperatively require that courts should put the stamp of their disapprobation on every act, and pronounce void every contract the ultimate or probable tendency of which would be to sully the purity or mislead the judgments of those to whom the high trust of legislation is committed." It was further said that all contracts to evade the revenue laws are void, as well as all marriage brokage contracts, and contracts for procuring appointments to office. In aid of these views may also be cited Hatzfield v. Gulden, 7 Watts, 152, 31 Am. Dec. 750, which was an agreement to obtain signatures for a pardon, and Clippinger v. Hepbaugh, 5 Watts & S. 315, 40 Am. Dec. 519, which was an agreement to procure the passage of a legislative act by personal influence, and Pingry v. Washburn, 1 Aikens, 264, 15 Am. Dec. 676, which was an agreement to pay for the withdrawal of opposition to an act of the Legislature, and Harris v. Roof,

10 Barb. 489, which was an agreement to obtain legislative action recognizing an ancient land grant, and Debenham v. Ox, 1 Ves. Sr. 276, which was an agreement to pay for soliciting a will in favor of another. Of the same general character is Gray v. Hook, 4 N. Y. 449, where two persons being applicants for an office, it was agreed that one should withdraw and aid the other in procuring the office, and in consideration thereof the fees should be divided between them. The agreement was held void.

The general rule as laid down in the cases cited is a salutary one. Care is necessary however in its application. Certain other rules and principles are also to be remembered. Thus the right to sell and dispose of property is an essential element of ownership. It is a right to which the owner is entitled to the full and unrestricted enjoyment. So the time, place and manner of sale are within the range of an owner's rights. He may sell personally or by agent, at private sale or by public auction. He may employ that agent, who by his zeal, his activity, his acquaintance or his good character may be likely to obtain the best price for the articles to be sold. So also a suitor in the courts of justice may employ that advocate, who in his opinion has the best qualifications to obtain the judgment he desires. To do so is his undoubted right. Learning, industry, eloquence, high personal character, the esteem in which he is held by the court, may all justly be considered by the party making the employment. It is allowable to employ counsel to appear before a legislative committee, or before the Legislature itself, to advocate or oppose a measure in which the individual has an interest. Mills v. Mills, 36 Barb. 474; Hillyer v. Trarene, 1 Am. Law Reg. 146; Howden v. Simpson, 10 Ad. & Ell. 193. It is allowable, and not unusual, to employ counsel thus to appear before the governor of the state, when he has under consideration the propriety of giving his sanction to a bill which has passed both branches of the Legislature. Will it be insisted that no advocate can be legally employed thus to appear, unless he is of doubtful reputation, or personally offensive to the Legislature or governor, or unless he belongs to a different political party? I apprehend not. An advocate of high personal character would naturally and most properly be employed in the discharge of such duties, and one who was likely, by his personal qualities or his political position, to be acceptable to the body before which he was to appear. The possession of such qualifications, and the knowledge of and reference to it, would form no objection to the employment. For an honest purpose, avowed to the body before which the appearance is made, and by the use of just argument and sound reasoning, this is lawful. Authorities supra. These principles are equally plain with those restricting the sale of political influence. Neither class of cases can be overthrown. The law is to be so applied that both may be preserved.

A distinction may also well be made upon those cases which I think will dispose of the present question. Personal solicitations of legis-

lators or of judges is not a lawful subject of contract. Personal solicitations of the president, the governor or the heads of department for favors or for clemency, is not the lawful subject of a contract. The apprehension that considerations other than those of a high sense of duty and of the public interest, may thus be brought to influence their determination, forbids this employment. But a different principle prevails where property is offered for sale to the government, and where a bargain is sought to be made with them, and where there is no concealment of the agency. It then becomes a matter of traffic. The agent says that he has vessels or arms for sale, and that he can furnish the government with what it needs and at a fair price; that the vessels are owned by Mr. Mitchell, or the arms are manufactured at Providence. As a general principle, the seller desires to obtain a high price, while the buyer desires to purchase at a low one. This element is known and appreciated by each party in making a bargain. I know of no principle upon which a seller should be compelled to employ an agent who would be looked upon with suspicion and distrust by the party to whom he wished to sell. In a time of revolution, when the Southern Confederacy, against which the arms or vessels were to be used, had friends at the North, would it be a legal objection to an agent desiring to sell munitions of war, that his loyalty to the government was undoubted? I cannot think so. The present case was one of bargain and sale simply. No fraud upon the government is imputed, no suggestion is made of pecuniary influence to be used, no intended corruption is suggested. The case to be decided is free from the existence of any of these elements.

An agent of the same political party with the executive or the heads of departments, having acquaintances and a reputation which would enable him to make an advantageous presentation of his merchandise, may in my opinion, be lawfully employed to make such sale, and with reference to those qualifications. The decision in Tool Co. v. Norris, 2 Wall. 45, 17 L. Ed. 868, confounds a sale or traffic openly made by an avowed agent to a party wishing to purchase, with the forbidden case of an interference with legislative action or executive clemency, where the party does not profess to act upon commercial principles. There is a manifest difference in the principle governing the cases. I think that case was not well considered, and cannot adopt it as an authority for the present. Judged by the principles I have set forth, the ruling at the trial was correct.

The rule of damages was rightly laid down, and I see nothing in the other points raised which will require a new trial.

Judgment should be affirmed.[3]

[3] Compare with Mills v. Mills, 40 N. Y. 543, 100 Am. Dec. 535 (1869), in which a contract for services to procure legislation was held to be void, as "leading to secret, improper and corrupt tampering with legislative action." Compare, also, two contracts for services in procuring the location of a post office. Elkhart County Lodge v. Crary, 98 Ind. 238, 49 Am. Rep. 746 (1884); Beal v. Polhemus, 67 Mich. 130, 34 N. W. 532 (1887).

TRIST v. CHILD.

(Supreme Court of the United States, 1874. 21 Wall. 441, 22 L. Ed. 623.)

Bill to enjoin Trist from drawing from the United States Treasury Department money appropriated by Congress to pay a claim of Trist. Child had been employed as attorney to secure the allowance of such claim on a contract to pay him 25 per cent. of any sum secured. Trist now refuses to pay Child.

Mr. Justice SWAYNE,[4] delivered the opinion of the court. [After considering other matters:] * * * But there is an objection of still greater gravity to the appellee's case.

Was the contract a valid one? It was, on the part of Child, to procure by lobby service, if possible, the passage of a bill providing for the payment of the claim. The aid asked by the younger Child of Trist, which indicated what he considered needful, and doubtless proposed to do and did do himself, is thus vividly pictured in his letter to Trist of the 20th February, 1871. After giving the names of several members of congress, from whom he had received favorable assurances, he proceeds: "Please write to your friends to write to any member of congress. Every vote tells, and a simple request may secure a vote, he not caring anything about it. Set every man you know at work. Even if he knows a page, for a page often gets a vote."

In the Roman law it was declared that "a promise made to effect a base purpose, as to commit homicide or sacrilege, is not binding." Just. Inst. lib. 3, tit. 19, par. 24. In our jurisprudence a contract may be illegal and void because it is contrary to a constitution or statute, or inconsistent with sound policy and good morals. Lord Mansfield said (Jones v. Randall, 1 Cowp. 39): "Many contracts which are not against morality, are still void as being against the maxims of sound policy."

It is a rule of the common law of universal application, that where a contract express or implied is tainted with either of the vices last named, as to the consideration or the thing to be done, no alleged right founded upon it can be enforced in a court of justice.

Before considering the contract here in question, it may be well, by way of illustration, to advert to some of the cases presenting the subject in other phases, in which the principle has been adversely applied.

Within the condemned category are: An agreement to pay for supporting for election a candidate for sheriff, Swayze v. Hull, 8 N. J. Law, 54, 14 Am. Dec. 399; to pay for resigning a public position to make room for another, Eddy v. Capron, 4 R. I. 395, 67 Am. Dec. 541; Parsons v. Thompson, 1 H. Bl. 322; to pay for not bidding at a sheriff's sale of real property, Jones v. Caswell, 3 Johns. Cas. 29,

[4] Part of the opinion is omitted.

2 Am. Dec. 134; to pay for not bidding for articles to be sold by the government at auction, Doolin v. Ward, 6 Johns. 194; to pay for not bidding for a contract to carry the mail on a specified route, Gulick v. Bailey, 10 N. J. Law, 87, 18 Am. Dec. 389; to pay a person for his aid and influence in procuring an office, and for not being a candidate himself, Gray v. Hook, 4 N. Y. 449; to pay for procuring a contract from the government, Tool Co. v. Norris, 2 Wall. 45, 17 L. Ed. 868; to pay for procuring signatures to a petition to the governor for a pardon, Hatzfield v. Gulden, 7 Watts, 152, 31 Am. Dec. 750; to sell land to a particular person when the surrogate's order to sell should have been obtained, Overseers of Bridgewater v. Overseers of Brookfield, 3 Cow. 299; to pay for suppressing evidence and compounding a felony, Collins v. Blantern, 2 Wils. 347; to convey and assign a part of what should come from an ancestor by descent, devise, or distribution, Boynton v. Hubbard, 7 Mass. 112; to pay for promoting a marriage, Scribblehill v. Brett, 4 Brown Parl. Cas. 144; Arundel v. Trevillian, 1 Ch. Rep. 47; to influence the disposition of property by will in a particular way, Debenham v. Ox, 1 Ves. 276. See, also, Add. Cont. 91; 1 Story, Eq. c. 7; Collins v. Blantern, 1 Smith Lead. Cas. 676, Am. note.

The question now before us has been decided in four American cases. They were all ably considered, and in all of them the contract was held to be against public policy, and void. Clippinger v. Hepbaugh, 5 Watts & S. 315, 40 Am. Dec. 519; Harris v. Roof's Ex'r, 10 Barb. 489; Rose & Hawley v. Truax, 21 Barb. 361; Marshall v. Railroad Co., 16 How. 314, 14 L. Ed. 953. We entertain no doubt that in such cases, as under all other circumstances, an agreement express or implied for purely professional services is valid. Within this category are included, drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing, to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced. They rest on the same principle of ethics as professional services rendered in a court of justice, and are no more exceptionable. But such services are separated by a broad line of demarcation from personal solicitation, and the other means and appliances which the correspondence shows were resorted to in this case. There is no reason to believe that they involved anything corrupt or different from what is usually practiced by all paid lobbyists in the prosecution of their business.

The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of universal history. 1 Montesq. Spirit of Laws, 17. The theory of our government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge

of their duties solely by considerations of right, justice, and the public good. They are never to descend to a lower plane. But there is a correlative duty resting upon the citizen. In his intercourse with those in authority, whether executive or legislative, touching the performance of their functions, he is bound to exhibit truth, frankness, and integrity. Any departure from the line of rectitude in such cases, is not only bad in morals, but involves a public wrong. No people can have any higher public interest, except the preservation of their liberties, than integrity in the administration of their government in all its departments.

The agreement in the present case was for the sale of the influence and exertions of the lobby agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means which, if not corrupt, were illegitimate, and considered in connection with the pecuniary interest of the agent at stake, contrary to the plainest principles of public policy. No one has a right, in such circumstances, to put himself in a position of temptation to do what is regarded as so pernicious in its character. The law forbids the inchoate step, and puts the seal of its reprobation upon the undertaking.

If any of the great corporations of the country were to hire adventurers who make market of themselves in this way, to procure the passage of a general law with a view to the promotion of their private interests, the moral sense of every right-minded man would instinctively denounce the employer and employed as steeped in corruption, and the employment as infamous.

If the instances were numerous, open, and tolerated, they would be regarded as measuring the decay of the public morals and the degeneracy of the times. No prophetic spirit would be needed to foretell the consequences near at hand. The same thing in lesser legislation, if not so prolific of alarming evils, is not less vicious in itself, nor less to be condemned. The vital principle of both is the same. The evils of the latter are of sufficient magnitude to invite the most serious consideration. The prohibition of the law rests upon a solid foundation. A private bill is apt to attract little attention. It involves no great public interest, and usually fails to excite much discussion. Not infrequently the facts are whispered to those whose duty it is to investigate, vouched for by them, and the passage of the measure is thus secured. If the agent is truthful, and conceals nothing, all is well. If he uses nefarious means with success, the spring-head and the stream of legislation are polluted. To legalize the traffic of such service, would open a door at which fraud and falsehood would not fail to enter and make themselves felt at every accessible point. It would invite their presence and offer them a premium. If the tempted agent be corrupt himself, and disposed to corrupt others, the transition requires but a single step. He has the means in his hands, with every facility and a strong incentive to use them. The widespread

suspicion which prevails, and charges openly made and hardly denied, lead to the conclusion that such events are not of rare occurrence. Where the avarice of the agent is inflamed by the hope of a reward contingent upon success, and to be graduated by a percentage upon the amount appropriated, the danger of tampering in its worst form is greatly increased.

It is by reason of these things that the law is as it is upon the subject. It will not allow either party to be led into temptation where the thing to be guarded against is so deleterious to private morals and so injurious to the public welfare. In expressing these views, we follow the lead of reason and authority.

We are aware of no case in English or American jurisprudence like the one here under consideration, where the agreement has not been adjudged to be illegal and void.

We have said that for professional services in this connection a just compensation may be recovered. But where they are blended and confused with those which are forbidden, the whole is a unit and indivisible. That which is bad destroys that which is good, and they perish together. Services of the latter character, gratuitously rendered, are not unlawful. The absence of motive to wrong is the foundation of the sanction. The tendency to mischief, if not wanting, is greatly lessened. The taint lies in the stipulation for pay. Where that exists, it affects fatally, in all its parts, the entire body of the contract. In all such cases, protior conditio defendentis. Where there is turpitude, the law will help neither party.

The elder agent in this case is represented to have been a lawyer of ability and high character. The appellee is said to be equally worthy. This can make no difference as to the legal principles we have considered, nor in their application to the case in hand. The law is no respecter of persons.

Decree reversed, and the case remanded, with directions to dismiss the bill.[5]

[5] See, also, Tool Co. v. Norris, 2 Wall. 53, 17 L. Ed. 868 (1864), and compare with Stanton v. Embry, 93 U. S. 548, 23 L. Ed. 983 (1876), upholding a contract upon a contingent fee for prosecuting a claim against the government. That a contract for services to aid or protect from injurious consequences in the future violations of the law is void, see Bowman v. Phillips, 41 Kan. 364, 21 Pac. 230, 13 Am. St. Rep. 292, 3 L. R. A. 631 (1889).

CHAPTER IV

CREATION OF THE RELATION

SECTION 1.—IN GENERAL.

RANEY & CHENEY v. WEED.

(Superior Court of New York, 1850. 3 Sandf. 577.)

DUER, J.[1] This is a motion to set aside a report of a referee, as contrary to law and evidence.

The action is brought by the plaintiffs, as the printers and publishers of a newspaper in the state of Michigan, to recover the amount of their bill for printing an advertisement of the sale of real estate, under an execution which was issued from the circuit court of the United States for that district, upon a judgment recovered in that court by the present defendants. The plaintiffs were employed and authorized to publish the advertisement, and to continue its publication with notices of the postponement of sale from week to week, for a period of nearly eighteen months, by the deputy marshal, in whose hands the execution had been placed for collection, and it is insisted that this employment created such a privity between the plaintiffs and defendants as entitles the former to maintain this action. The referee, adopting this view of the case, has reported that there is due to the plaintiffs the sum of $510, which is the amount of their bill exclusive of interest.

Upon the hearing, various objections to the report, arising upon the facts as well as upon the law, were forcibly urged by the counsel for the defendants, but the only question we have found it necessary to consider, and shall determine, is the main question of law, upon which the right of the plaintiffs to recover at all depends, namely, whether there exists such a privity of contract or of law, between them and the defendants, as can render the latter personally liable. * * *

In our judgment, therefore, the liability of the defendants depends solely upon the proper answer to be given to the general question, whether the plaintiff in an execution is directly and personally responsible upon every contract which the marshal or sheriff, to whom the execution has been delivered, may find it necessary or convenient to make, in order to render the process effectual. * * *

[1] Part of the opinion is omitted.

The argument that has been relied on in this case as supplying this demonstration may be stated in a few words. It is said that a marshal or sheriff, to whom a fi. fa. or other process has been delivered, becomes by the very act of its delivery the agent of the plaintiff in whose favor it is issued. * * *

We have always understood, and until better instructed must continue to believe, that the relation of principal and agent is in all cases a voluntary relation, springing from a contract, to which, as to all other contracts, the consent of the parties is essential. It is described and treated as a purely voluntary relation by all the text writers, by Paley, by Livermore, and by Judge Story, whose treatise upon the subject, although one of the earliest, is perhaps the most complete and accurate of his numerous publications. As all these writers explain the relation, it is from the principal, and from the principal alone, that the agent derives his authority. It is the will of his principal that fixes the limits of his authority, regulates its exercise and determines its existence. The principal appoints, directs, controls, removes him. It is plain that these observations cannot be applied to the relation between the marshal or sheriff, and the suitors, who in the prosecution of their legal rights are constrained to employ him. As they have not the power of selection, nor he the liberty of refusal, it cannot be said that this relation flows from the will of the parties. It is the creation of the law, not the result of a contract. He is a public officer, who, when he acts for individuals, acts, not by virtue of their choice or of his own agreement, but in discharge of a positive, independent duty. He is appointed by the government, or elected by the people, is removable only by the appointing power or by process of law, and unless where special instructions are given to him, it is the law, and the law alone, that defines his authority and prescribes his duties, and controls him in their discharge. When special directions are given to him the plaintiff is, doubtless, responsible for his acts, so far as the directions are followed, and in such cases the officer, within a limited sphere and in a restricted sense of the term, becomes the agent of the suitor. * * *

We do not deny, but on the contrary distinctly admit, that in every civil suit in which the sheriff is employed, a privity, and therefore a mutual liability, does exist between him and the plaintiff, but it is a privity which the law, and not the consent of the parties, creates and defines. It does not flow from the ordinary relation of principal and agent, nor is it governed by the rules upon which the rights and liabilities of the parties in that relation usually depend. There is, indeed, a partial analogy, by which the counsel for the plaintiff and the referee have probably been misled, but the analogy fails in the material circumstances upon which the liability of a principal for the acts of his agent is reasonably founded. It is perfectly just, that he, who employs an agent, should be responsible for the acts, within the scope of his authority, of the person whom he selects, trusts and controls;

but it is not just that any person should be responsible for the acts of a public officer, whom, without regard to his own wishes, the law commands, and unless he choose to abandon his rights, compels him to employ.

It is not just that he should be liable for the acts of a person whom he does not select, may not trust, and has no power to remove. So far as by special instructions he controls his discretion, and so far as he participates in the wrongful acts of the officer, he is justly liable, and no further. * * *

The report must be set aside, with costs to abide the event.[2] * * *

POLE v. LEASK.

(House of Lords, 1862. 9 Jur. N. S. 829, 33 L. J. Ch. 155, 8 L. T. Rep. N. S. 645.)

Leask, a broker in the colonial fruit trade, was introduced to Pole & Co. by one Anderson, and was at the interview directed to make purchases under the direction and orders of Anderson. Large purchases were made, and acknowledged by Pole & Co. as made in accordance with their intentions, up to a certain period. Thereafter, Anderson ordered Leask to make further purchases, and fraudulently appropriated to himself moneys and goods, so that there was a loss on the business. Leask sued to hold Pole & Co. liable on the ground that they had made Anderson a partner, or at least an agent. The Lord Chancellor rendered the prevailing opinion, holding Pole & Co. liable upon those grounds.

Lord CRANWORTH did not regard the facts as showing even an agency at the time of the purchases, and in a much quoted dissenting opinion laid down the following propositions:

My Lords, before I examine in detail the facts of this case, I desire to advert very shortly to one or two general propositions connected with the law of agency, which I think were sometimes lost sight of in the argument of this case at your Lordship's bar. First, then, as to the constitution by the principal of another to act as his agent. No one can become the agent of another person except by the will of that other person. His will may be manifested in writing, or orally, or simply by placing another in a situation in which, according to ordinary rules of law, or perhaps it would be more correct to say, according to the ordinary usages of mankind, that other is understood to represent and act for the person who has so placed him; but in every

[2] See, also, Markwick v. Hardingham, 15 Ch. Div. 339, 43 L. T. Rep. N. S. 647, 29 W. R. 361 (1880), holding that the relation of principal and agent requires the consensus of both parties; Central Trust Co. v. Bridges, 57 Fed. 753, 764, 6 C. C. A. 539 (1893); In re Carpenter (D. C.) 125 Fed. 831 (1903).

case it is only by the will of the employer that an agency can be created.

This proposition, however, is not at variance with the doctrine, that where one has so acted as from his conduct to lead another to believe that he has appointed some one to act as his agent, and knows that that other person is about to act on that behalf, then, unless he interposes, he will, in general, be estopped from disputing the agency, though in fact no agency really existed. It is, however, necessary to bear in mind the difference between this agency by estoppel, if I may so designate it, and a real agency however constituted.

Another proposition to be kept constantly in view is, that the burden of proof is on the person dealing with any one as an agent, through whom he seeks to charge another as principal. He must show that the agency did exist, and that the agent had the authority he assumed to exercise, or otherwise that the principal is estopped from disputing it.[3]

Unless this principle is strictly acted on, great injustice may be the consequence; for any one dealing with a person assuming to act as agent for another can always save himself from loss or difficulty by applying to the alleged principal to learn whether the agency does exist, and to what extent. The alleged principal has no similar mode of protecting his interests; he may be ignorant of the fact that any one is assuming to act for him, or that persons are proposing to deal with another under the notion that that other is his agent. It is, therefore, important to recollect constantly where the burden of proof lies.

In GEYLIN v. DE VILLEROI (1860) 2 Houst. (Del.) 311, the court (GILPIN, C. J.) gave to the jury these instructions:[4]

"There is no special character or description of written instrument, nor any particular form of words, necessary to the appointment of an agent. The modes of appointment are various, and the agency may be created either by express words, or acts of the principal, or it may be implied or inferred from the circumstances and conduct of the parties. The authority conferred may be either general or special; and the fact of agency, of either description, may be established, either by direct or indirect evidence. It may be shown directly, by express words of appointment, either spoken or written. Or, it may be implied or inferred, or indirectly shown, by evidence of the relative situation of the parties, the nature of the business which is the subject of controversy, and the character of the intercourse between them, provided the facts and circumstance disclosed by the evidence, fairly

[3] See, also, Hill v. Helton, 80 Ala. 528, 1 South. 340 (1886), post, p. 773, holding that to establish agency the alleged principal must in some way, directly or indirectly, be connected with the circumstances.

[4] Another portion of these instructions is found post, pp. 334, 774.

justify such an inference. The acts and doings of the party sought to be charged as principal, in relation to the subject matter, may be, and often are, quite as expressive and significative as words spoken.[5]

SECTION 2.—IMPLIED AGENCY

TRUNDY v. FARRAR.

(Supreme Judicial Court of Maine, 1850. 32 Me. 225.)

Kelly indorsed notes payt to Proprietors of Town of B. Pl sues on note; Defence is Kelly had no authy to indorse

Assumpsit upon three negotiable notes given by defendant to the proprietors of the town of Baileyville, indorsed by "Samuel Kelly, Agent." The authority of Kelly so to indorse the notes is the question of the case. To prove his agency plaintiffs offered to show by parol that he had acted as agent of the proprietary from 1834 to the present time, giving deeds, indorsing notes, bringing suits, and taking care of the property. The court ruled this evidence inadmissible for the purpose. They then introduced records of the proprietors showing the choice of Kelly as agent, and that he had acted as agent from his election to the present time, that they have no other agent, and that he had transacted all their business. This and other similar evidence the presiding judge ruled insufficient to show authority in Kelly to indorse notes.

If, in the opinion of the whole court, the aforesaid rulings were correct, and the evidence insufficient to maintain the action, the plaintiff is to be nonsuit; otherwise a new trial is to be granted.

TENNEY, J. "A general agency exists, where there is a delegation to do all acts connected with the particular business or employment." Story's Agency, § 17. "The principal will be bound by the acts of his agent, within the scope of the general authority conferred on him." Ibid. § 126.

The authority of an agent may be created verbally, without writing, excepting for some special acts, and may be inferred from the relation of the parties, and the nature of the employment, without proof of any express appointment. It is sufficient if there be satisfactory evidence of the fact, that the principal employed the agent, and that the agent undertook the trust. The agency must be antecedently given, or be subsequently adopted. 2 Kent's Com. Lect. 41, pp. 477 and 478.

It is very usual to prove the agency by inference from the habits and course of dealing between the parties. These may be such as to show that there was an appointment sufficiently broad to cover the

[5] See, also, Hall v. Smith, 3 Kan. App. 685, 44 Pac. 908 (1896), and Sternaman v. Metropolitan Life Ins. Co., ante, p. 2, Reynell v. Lewis, 15 M. & W. 517, 527 (1846).

acts done by the agent, or that there has been a continued ratification thereof; the principal would be bound by either. "Having himself recognized another as his agent, by adopting and ratifying his acts, done in that capacity, the principal is not permitted to deny the relation to the injury of third persons." 2 Greenl. Ev. § 65; Story on Agency, §§ 56, 127. "When an agency actually exists, the mere acquiescence may well give rise to the presumption of an intentional ratification of the act." Ibid. § 256.

On the question, whether a person is an agent of a corporation or not, the same presumptions are applicable to such bodies, as to individuals, and that a deed, or a vote or by-law is not necessary to establish a contract, promise or agency. Maine Stage Co. v. Longley, 14 Me. 444; 2 Greenl. Ev. § 62. "In America the general doctrine is now firmly established, that whenever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made with its authorized agents, are express contracts of the corporation." Story's Agency, § 53. "In all matters of daily necessity within the ordinary powers of the officers of a corporation aggregate, or touching its ordinary operations, the authority of its agents may be proved, as in the case of private persons." 2 Greenl. Ev. § 62.

The notes in suit were given by the defendant to the proprietors of Baileyville, for a lot of land, which he purchased of them, and indorsed by Samuel Kelly as agent. The questions presented are, whether there was sufficient evidence from the vote of the proprietors, of authority in Kelly to negotiate the notes in their behalf; and whether there was evidence before the jury upon which they should have passed in relation to the existence of the agency, arising from the conduct of the proprietors.

The vote passed June 9, 1834, was introduced as evidence by the plaintiff, without objection, and is in these words: "Voted, that the agent be and is authorized to bargain and sell any of the lands of the proprietors, to attend to the disposing of the grass thereon, and the working out of the proprietor's taxes, and to attend to such other business as may concern the general interest." This vote is very comprehensive. The terms used, in the vote of an organized proprietary, would authorize the transfer of their lands by their agent. The right to bargain and sell them involves the power to receive the consideration. The authority to attend to such other business as may concern the general interest, will embrace the power to receive notes, for the consideration and payment of the same; and if it was found more for the interest of the proprietors to negotiate those notes, than to obtain the sums secured thereby, by directly calling upon the makers, it would not exceed the limits of the agency.

It was shown by the records that Samuel Kelly was chosen agent in the year 1834, and that he had acted as such from that time, to the

time of the trial of the action, indorsing and transferring notes, given for lands, sold by him as their agent, giving deeds and generally transacting their business, and all their business, they having no other agent; that in the year 1836 the greater part of their lands, then unsold, was transferred, to be held in severalty; and that the notes and securities held at that time, were transferred to him. The proprietors having elected Kelly as their agent, for some purpose, these acts of his, it may fairly be inferred, were known to them, and were acquiesced in. A jury might be authorized to make the inference, that as he took notes as the consideration of deeds given by him of the proprietors' lands, and transferred notes given therefor; and as the notes and securities held by the proprietors were transferred by the proprietors themselves, he was their general agent, and clothed with the power to do that, which had for so long a time been done without any objection, made by them. The acquiescence of the proprietors in these acts, many of which must have been generally known, during the time, he acted as their sole agent, and they had meetings and passed votes in relation to his authority, was evidence that they had authorized him to transact their business in the manner in which he did it, and that he was possessed of full power to perform all the duties of their general agent.

The objection to Kelly's authority to transfer the notes in suit does not come from the proprietors, but from the defendant, who dealt with them through their agent, Kelly. He received the value of the notes, and is bound to pay the amount to some one. The facts in proof are such as would induce the plaintiff to conclude, that Kelly was the agent; or was held out to the world as such, and if so, good faith requires, that the proprietary should be bound by his acts.[6] This would effectually protect the plaintiff from loss, and would equally secure the defendant from all exposure to pay his notes a second time. We think, independent of the vote of the proprietors, there was evidence of the agency of Kelly, which might with propriety be submitted to a jury.

According to the agreement of the parties, the action is to stand for trial.

[6] The implied authority rests not so much upon the number as upon the character of the previous acts of the agent. In Anderson v. Johnson, 74 Minn. 171, 77 N. W. 26 (1898), it was held that "a single act of an assumed agent, and a single recognition of his authority by his principal, if sufficiently positive and comprehensive in their character, may be sufficient to prove agency to do similar acts"—quoting Wilcox v. C., M. & St. P. R. Co., 24 Minn. 269 (1877).

GREGORY v. LOOSE.

(Supreme Court of Washington, 1898. 19 Wash. 599, 54 Pac. 33.)

Action against Loose, doing business as the Riverside Shingle Company. Appeal from judgment for plaintiff.

ANDERS, J. On and prior to February 5, 1895, the Riverside Shingle Company was the owner of a shingle mill at Machias, in Snohomish county; and on or about that day it conveyed all of its property, including the shingle mill, to the Snohomish National Bank, in payment of its indebtedness to the bank. The mill was thereafter known and designated as the Riverside Shingle Mill. Soon after the transfer the bank started up the mill, under the general supervision of appellant, Loose, who was the bank's cashier, and proceeded to manufacture shingles from bolts furnished by other parties having them for sale. One R. P. Mathews was employed to operate the mill, with authority to contract for and estimate shingle bolts, subject to the approval of the appellant. In September or October, 1895, said Mathews employed one C. R. Gregory to construct a logging road to some timber which appellant had contracted for, and which was to be cut either by appellant or his vendors, and removed within five years from the date of the contract, which contract was in writing. Said Gregory, by the direction or consent of Mathews, employed the respondent and several other persons to labor on the road. As superintendent of construction, said Gregory kept the time of the men employed, and on or about October 25, 1895, demanded from Mr. Loose the amount alleged to be due them respectively for their labor. Payment was refused on the ground that the making of the road had not been authorized by appellant, and that neither appellant nor the bank had any knowledge that it was being constructed. This action was thereupon instituted to recover the amount claimed to be due respondent and others, whose claims were assigned to him, for labor performed in the construction of the road.

It is not claimed that either the respondent or any of his assignors was personally requested or authorized by Mr. Loose to perform the labor for the value of which this action is waged, but the contention is that Mathews was appellant's agent to construct the road, and as such agent was authorized to bind appellant for the payment for the labor performed thereon. And it cannot reasonably be claimed that Mathews' act in authorizing Mr. Gregory to construct the road was ratified by the appellant, for we discover no evidence of such ratification in the record. If, therefore, Mathews was the agent of appellant for the purpose claimed, it was either because appellant held him out to the public as such agent, or because what he did in that regard was within the authority which appellant had actually given him, or within the apparent authority which he knowingly and without dissent permitted him to assume. 1 Am. & Eng. Enc. Law (2d Ed.) pp. 988, 989.

The actual authority, as we have said, which was delegated to Mathews, was authority to operate the Riverside Shingle Mill, and to contract for shingle bolts, and estimate the value thereof, subject to the approval of appellant. The bolts were paid for in every instance by appellant at the bank, and generally, if not always, by checks signed: "Riverside Shingle Mill. U. K. Loose, Agent." During Mathews' employment at the mill, he sometimes gave orders on merchants for the delivery of limited quantities of groceries or other merchandise to men who were furnishing shingle bolts or working in the mill. The amount of the respective orders was reported to appellant by Mathews, and was generally deducted from the sum due to the person who received the goods, and paid to the drawee, although it appears that in several instances such payment was refused.

Respondent introduced evidence at the trial to the effect that Mathews negotiated a contract for timber for appellant with certain designated persons, but the contract was finally executed by appellant himself, and contained no provision whatever for the building of a logging road; and this, too, notwithstanding the fact that the witness C. R. Gregory testified that Mathews, when negotiating for the timber, said to the vendors thereof, who were insisting that a road should be constructed to it, "We will make the contract with this in it, and we will build that road immediately." This is the contract which we mentioned above as providing for the removal of the timber purchased within five years. Evidence was also introduced by respondent to the effect that Mathews made an arrangement with one Eddy for a right of way over his land for a logging road in favor of appellant, and located the same; but, like the timber contract, this contract, which was a lease for a term of five years, was executed by appellant himself,—one Packard, as well as said Eddy, being a lessor.

The first and principal question to be determined is, do the facts above set forth, singly or together, warrant the finding that Mathews had the power to bind the appellant by the act of authorizing the building of the road in question? And we are of the opinion that this question must be answered in the negative, for no such power can legitimately be deduced from the facts appearing in the record. It is true that an agency to do a particular thing may be implied from the habits and general course of dealing between the parties, but in this instance nothing of the kind could be shown, as no logging road had ever been constructed or authorized by the appellant. It is also true that the authority to act as an agent in a particular business or transaction may often be implied from acts done in the course of the agent's employment in some other business. "But it is not to be inferred, however, that authority is, in any case, to be implied without reason, or presumed without cause. The implication must be based upon facts, and cannot arise from any mere argument as to the convenience, utility, or propriety of its existence. So, too, the facts from which it is sought to

be implied are to be given their natural, legal, and legitimate effect, and this effect is not to be expanded or diminished in order to establish or overthrow the agency." Mechem, Ag. § 85. See, also, Story, Ag. § 87; McAlpin v. Cassidy, 17 Tex. 449. But it is well settled in the law of agency that the extent of implied authority is limited to acts of a like kind with those from which it is implied, and that an implied power is never extended by construction beyond the obvious purpose for which it is granted. 1 Am. & Eng. Enc. Law (2d Ed.) p. 1002; Mechem, Ag. §§ 85, 274, 312; Story, Ag. § 87; McAlpin v. Cassidy, supra; Graves v. Horton, 38 Minn. 66, 35 N. W. 568.[7]

Applying these principles, it seems plain to us that the building of a logging road was not within the scope of the authority, real or apparent, delegated to Mathews; for it is an act of an entirely different kind from that of operating a shingle mill, contracting for shingle bolts, or conducting preliminary negotiations for a right of way, or the purchase of a quantity of timber. In our judgment, if it can be inferred from the facts in this case that he was authorized to build the road in question, it might with equal propriety be inferred that he was authorized to construct a railroad at the expense of the appellant, for the one is as foreign to his employment as the other. It was the duty of Mr. Gregory to ascertain the extent of Mr. Mathews' authority before engaging in this undertaking, and he had no reasonable excuse for not ascertaining it. Hurley v. Watson, 68 Mich. 531, 36 N. W. 726. He could have ascertained the fact by simply asking a question, but, instead of doing so, he relied upon the acts and representations of the assumed agent; and he admitted in his testimony, in effect, that in so doing he acted unreasonably, and in fact foolishly. The testimony also shows that he himself had previously advised the appellant not to build a road at that time of the year. Giving due weight to all the material evidence in the record, it seems clear to us that there was not sufficient evidence to justify a verdict in favor of the respondent, and the learned trial court therefore erred in not taking the case from the jury at appellant's request.

It was also error, we think, to permit certain witnesses to testify as to what this supposed agent told them that appellant said, or had concluded to do, with respect to this logging road. This was clearly hearsay testimony, and hence not admissible. Nor were the acts and declarations of Mathews competent evidence in proof of agency. Comegys v. Lumber Co., 8 Wash. 661, 36 Pac. 1087.

[7] See, also, Hazeltine v. Miller, 44 Me. 177 (1857), holding that, while the authority of an agent to act for and bind his principal may be implied from the fact that such agent has been accustomed to perform acts of the same general character for his principal with his consent, yet the acts from which such authority is to be implied must be of the same general character and effect. From authority to collect for his principal money from the use and sale of property could not be implied authority to embark on business enterprises for his principal.

Certain portions of the charge of the court to the jury are objected to by appellant, but we perceive no substantial error therein, except in the application of the general principles of law announced to the facts of the case; but it is unnecessary to enter upon a discussion of the several objections raised, as the judgment must be reversed for reasons already indicated. Reversed and remanded for further proceedings.

DUNBAR, J., dissents.

SECTION 3.—BY ESTOPPEL

COLUMBIA MILL CO. v. NATIONAL BANK OF COMMERCE.

(Supreme Court of Minnesota, 1893. 52 Minn. 224, 53 N. W. 1061.)

GILFILLAN, C. J.[8] The plaintiff was a corporation in the business, at Minneapolis, of manufacturing and selling flour, and the defendant was a bank at that place. The action is for the conversion of 19 checks drawn by different persons or firms upon different banks or concerns, each payable to the order of, and the property of, the plaintiff. The allegations of the complaint are that one Leo Heilpern feloniously abstracted and purloined the checks from plaintiff, wrongfully and without authority impressed on the back of each, with a rubber stamp, the words "Columbia Mill Co.," and wrote underneath his name, L. Heilpern, and wrongfully sold and disposed of them to defendant, which collected and appropriated to its own use the money called for by them. Heilpern was plaintiff's bookkeeper and cashier; that is, he had charge of its books and its "petty cash," i. e. the payments received upon its sales at retail.

The sole controversy was on Heilpern's authority to dispose of and receive the money for the checks. It was conceded that he had no express authority to do so, and the question was narrowed to that of implied authority, and the further question, if it be not included in that, as to whether the plaintiff had either intentionally or negligently so conducted its business with defendant, or permitted it to be so conducted, that it had a right in good faith to believe, and did believe, that Heilpern had the authority he assumed to exercise, and, acting on and because of such belief, received the transfer of the checks, and paid him the money. It appeared that, when the relation of banker and patron between defendant and plaintiff began, the latter left in the signature book of the former the signature of S. Zeidler, its treasurer, as of the only person authorized to sign for it in its transactions with the bank, and except during a short period, when he was absent, his

[8] Part of the opinion is omitted.

was the only signature in the bank for that purpose. It also appeared that there grew up and continued for years a usage that when plaintiff sent to the bank, for deposit to its credit, checks payable to its order, it made no other indorsement on them than by impressing it with a rubber stamp. Whether there was a similar usage in any other bank is immaterial. It existed between these parties. It also appeared that Heilpern and his predecessors in employment as bookkeeper and cashier, extending over a period of two or three years, were accustomed to take or send to the bank, and transfer to it, and receive the money for, checks, mostly small ones, payable to its order, with no indorsement except with the stamp, or with none at all.

It was upon this custom mainly that defendant relied to show implied or at least apparent authority in Heilpern to transfer the checks without the signature of Zeidler, and receive the money for them. And because one dealing with an agent may show actual authority in him,—that is, such authority as the principal in fact intended to vest in the agent, although such intention is to be shown by acts and conduct, rather than by express words,—without showing that he (the person dealing with the agent) knew when he dealt with him of the acts and conduct from which the intention is to be implied, it was competent for defendant to show the course and manner of conducting business in the office of plaintiff, so far as the bookkeepers and cashier had charge of it. The officers of plaintiff testified that Heilpern had no authority to transfer the checks and receive the money, and that they never knew of the bookkeeper and cashier doing so with plaintiff's checks. But the jury were not bound to their testimony. Such a manner of conducting the business in the office might have been proved as would have justified the jury in finding that the officers must have known of the custom of the bookkeeper and cashier in regard to checks; and had that been found, and that it was acquiesced in by plaintiff, the intention to vest authority might have been implied.

For the sake of convenience, we make a distinction between implied authority—that is, such as the principal in fact intends the agent to have, though the intention is implied from the acts and conduct of the principal—and apparent authority,—that is, such as, though not actually intended by the principal, he permits the agent to appear to have. The rule as to apparent authority rests essentially on the doctrine of estoppel. The rule is that, where one has reasonably and in good faith been led to believe from the appearance of authority which a principal permits his agent to have, and because of such belief has in good faith dealt with the agent, the principal will not be allowed to deny the agency, to the prejudice of the one so dealing.

One may be estopped by his acts of culpable negligence, as well as by his intentional acts; and if through culpable negligence the plaintiff permitted Heilpern to appear to the bank to have authority to transfer the checks and receive the money, and the latter reasonably and in good faith was induced by such appearance to believe he had that au-

thority, and on that belief received and paid for the checks, plaintiff cannot deny the authority, for to permit it to do so would sanction a fraud.[9] * * *

Order denying to defendant a new trial reversed, for error in the charge to the jury.

SECTION 4.—EXPRESS AUTHORITY

I. In General—Written Power

WORRALL v. MUNN.

(Court of Appeals of New York, 1851. 5 N. Y. 229, 55 Am. Dec. 330.)

Action for specific performance of a contract under seal to sell land. The defendants objected to the contract for various reasons, one of which was that it was executed for plaintiff, Noah Worrall, by Henry Worrall, who was not authorized by a written power of attorney under seal to execute said instrument. From a decree of the Supreme Court dismissing complainant's bill an appeal is taken.

[9] See, also, Hackett v. Van Frank, 105 Mo. App. 384, 79 S. W. 1013 (1904), holding that to establish agency by estoppel the party asserting the agency must have been deceived, and that he must have relied on the acts of the principal creating the estoppel. It is not so in the case of an actual agency, implied or express. See, also, Clark v. Dillman, 108 Mich. 625, 66 N. W. 570 (1896), in which the court says: "It is undoubtedly the law that a person may be bound by the representation and acts of another, as agent, where there has been such a holding out as to reasonably lead one dealing with him to believe in the existence of such agency. But all of the elements of an estoppel must be present. There must be conduct calculated to mislead, and it must be under circumstances which justify the claim that the alleged principal should have expected that the representations would be relied and acted upon; and, further, it must appear that they were relied and acted upon, in good faith, to the injury of an innocent party. Mechem, Ag. §§ 85, 86; Railroad Co. v. Chappell, 56 Mich. 190, 22 N. W. 278. The rule that estops a party from denying the existence of an agency is a shield, and not a sword; and unless the jury could find from the evidence that the defendant acted in good faith, and in the honest belief that Pressburg had authority to sell this piano for $450, and that he purchased it to his injury, a verdict for the defendant should not have been rendered. There is no allusion in the charge to the other elements essential to an estoppel, and, in the testimony returned, we discover no avowal of belief in, or bona fide reliance upon, the authority of Pressburg, unless the circumstances were sufficient evidence to go to the jury upon this subject. In any event, there was ample opportunity for the jury to find the contrary. Maxwell v. Bridge Co., 41 Mich. 454, 2 N. W. 639; Ferguson v. Millikin, 42 Mich. 443, 4 N. W. 185; Morrill v. Mackman, 24 Mich. 279, note; De Mill v. Moffat, 49 Mich. 125, 131, 13 N. W. 387; Fletcher v. Circuit Judge of Kalkaska, 81 Mich. 193, 45 N. W. 641; Bank v. Todd, 47 Conn. 219."

In Dispatch Printing Co. v. Nat. Bank of Commerce, 109 Minn. 440, 124 N. W. 236 (1910), the court attempts a distinction between apparent authority, resting on the conscious permission by the principal of acts beyond the powers granted, and authority by estoppel, which has its basis in the neglect of the principal.

PAIGE, J.[10] [After stating the facts and disposing of some other objections:] * * * The only remaining questions to be considered are, whether the authority of Henry Worrall to execute the counterpart should have been under seal; whether he executed the agreement in the name of his principal; and if the counterpart was not binding on Noah Worrall, whether the original was binding on Prall.

It is a maxim of the common law that an authority to execute a deed or instrument under seal must be conferred by an instrument of equal dignity and solemnity; that is, by one under seal. This rule is purely technical. A disposition has been manifested by most of the American courts to relax its strictness, especially in its application to partnership and commercial transactions. I think the doctrine as it now prevails may be stated as follows, viz.: if a conveyance or any act is required to be by deed, the authority of the attorney or agent to execute it must be conferred by deed; but if the instrument or act would be effectual without a seal, the addition of a seal will not render an authority under seal necessary, and if executed under a parol authority or subsequently ratified or adopted by parol, the instrument or act will be valid and binding on the principal. It is said that the rule as thus relaxed is confined in its application to transactions between partners. But it seems to me that a distinction between partners and other persons in the application of the rule as relaxed and qualified by recent decisions, stands upon no solid foundation of reason or principle.

The whole authority of a partner to act for his copartners and to bind them and their interest in the copartnership property is founded upon the common-law doctrine of agency. So far as he acts for his partners, he is an agent. Story on Part. § 1. Thus, it is a general rule of the common law that one partner cannot, from the mere relation of partnership, bind his copartners by deed or instrument under seal, even in commercial dealings unless specially authorized to do so by an instrument under seal. Story on Part. § 117; 3 Kent's Com. (6th Ed.) 47.

This rule springs from the common-law maxim before mentioned, applicable to the general relation of principal and agent. There are numerous cases in the American courts in which the rule has been relaxed as regards partnership transactions, in order to adapt it to the necessities of trade. Story on Part. § 117; 3 Kent's Com. 48. Thus the doctrine as applicable to partners is now firmly established, that wherever an act done by a partner within the scope of the partnership business would be valid if done by an unsealed instrument, then, although done by an instrument under seal, it will be valid and bind his copartners if it is authorized by a prior parol authority or adopted by a subsequent parol ratification. Story on Part. §§ 121, 122; Anderson v. Tompkins, 1 Brock. 462, Fed. Cas. No. 365, Marshall, C. J.; 3

[10] Part of the opinion is omitted.

Kent's Com. (6th Ed.) 48; Smith v. Kerr, 3 Comst. (3 N. Y.) 150; Gram v. Seton, 1 Hall, 293, Jones, C. J.; Skinner v. Dayton, 19 Johns. 513, 553, 10 Am. Dec. 286; Everit v. Strong, 5 Hill, 163; Tapley v. Butterfield, 1 Metc. (Mass.) 515, 35 Am. Dec. 374; Cady v. Shepherd, 11 Pick. 400, 403, 22 Am. Dec. 379. And the rule that one partner cannot bind his copartners by deed without an authority under seal has been held in several cases not to apply to a case where one partner conveys by deed property of the firm which he might have conveyed by an unsealed instrument or by parol. The mere addition of the seal does not vitiate the conveyance. Tapley v. Butterfield, 1 Metc. (Mass.) 515, 35 Am. Dec. 374; Anderson v. Tompkins, 1 Brock. 462, Fed. Cas. No. 365; Everit v. Strong, 5 Hill, 165; Milton v. Mosher, 7 Metc. (Mass.) 244. In Gram v. Seton, supra, Chief Justice Jones, of the Supreme Court of the city of New York, held that the authority of one partner to bind his copartners by deed may even be implied from the acts and acquiescence of the copartners. No good reason can be assigned for a distinction between partners and other persons in relation to the technical rule of the common law, that in all cases an authority to execute a deed must be by deed. The rights and liabilities of partners in their acts for each other are governed by the same rules as are the relations of principal and agent; each partner being considered an agent for his copartners; and the same questions of express and implied, general and special authority, must arise between partners as between principal and agent. Upon principle, therefore, whenever an instrument, either as between partners or principal and agent, would be effectual for the purpose intended without a seal, the addition of a seal should not create the necessity of an authority under seal to authorize an agent to execute it.[11]

In Lawrence v. Taylor, 5 Hill, 113, Cowen, J., speaking of a specialty executed by an attorney without authority under seal, says: "Yet in such case it does not follow that it shall not operate at all. If the contract may be made without deed, the seal shall not prevent its inuring as a simple contract, though the authority be by parol or merely implied from the relations between the principal and agent." In Skinner v. Dayton, 19 Johns. 554, 558, 10 Am. Dec. 286, in the Court of Errors, Spencer, C. J., held that the contract executed in that case by Skinner, under seal for the directors of the company, ought not to be considered a personal covenant of Skinner in equity, and that the company were liable for a breach of the covenant, although the authority of Skinner was not conferred by deed; and such was the decision of the Court of Errors. Skinner was a director, and the president of an association for manufacturing cotton, and entered into a contract for the making of some machinery for the company. The contract was ratified by the subsequent parol assent and acts of the

[11] The agent of a corporation may be appointed for any purpose without the use of a seal. See Fitch v. Steam Mill Co., 80 Me. 34, 12 Atl. 732 (1888), and the cases there cited.

stockholders. The court decided that such subsequent ratification was an adoption of the act of the agent and equivalent to a previous positive and direct authorization to do the act.

In Randall v. Van Vechten, 19 Johns. 60, 10 Am. Dec. 193, a contract under seal had been entered into by the defendants as a committee of the corporation of the city of Albany, with the plaintiffs, without authority under seal from the corporation. But the corporation had subsequently recognized by parol the authority of the committee to make the contract, and it was held that the contract was binding on the corporation, and that an action of assumpsit would lie against the corporation for its breach.

In Bank of Columbia v. Patterson, 7 Cranch, 299, 307, 3 L. Ed. 351, a committee of the corporation, without any authority conferred by deed, had made a contract in their own names as such committee under their private seals, and the Supreme Court of the United States held that as the whole benefit of the contract resulted to the corporation, and as the corporation had by its acts subsequently adopted the contract, an action of assumpsit would lie on the contract against the corporation.

In White v. Cuyler, 6 T. R. 176, where a wife unauthorized by her husband made an agreement under seal with a servant, providing for the services of the latter, and the servant performed the services, it was held that although the covenant of the wife could not bind the husband, the servant could, nevertheless, maintain assumpsit against the husband. In Damon v. Granby, 2 Pick. 352, it was decided that although an agent who contracts for the use of a corporation under his own seal does not bind the corporation by the deed, yet if he had authority to make the contract it shall be binding on the corporation as evidence of such contract.

In Evans v. Wells, 22 Wend. 340, 341, Senator Verplank said that these rules as to sealed instruments were not applicable to cases where a deed is not necessary, and that in such cases an act of the agent under seal may be ratified by acts in pais.

In Hanford v. McNair, 9 Wend. 54, an agent had executed a contract under seal for the purchase of timber, not being authorized by deed. Sutherland, J., said that subsequent acts of the principal recognizing and carrying the agreement into effect might be sufficient to make the contract binding on the principal as a parol contract.

In Blood v. Goodrich, 12 Wend. 527, 27 Am. Dec. 152, and in Hanford v. McNair, 9 Wend. 54, the Supreme Court, in laying down the common-law rule that an authority to execute a deed must be conferred by deed, did not advert to the distinction between cases where the conveyance or contract must be made under seal and cases where they would be effectual without a deed. These authorities show that there is no distinction between partners and other persons in the application of the modern rule, that wherever an instrument would be

effectual without a seal, it will be valid and binding on the principal, although executed under seal by an agent without authority by deed, if authorized by a previous parol authority, or subsequently ratified or adopted by parol.

In this case a seal was not necessary to the validity of the contract for the sale of the lands at Haverstraw. All that the statute of frauds requires is that a contract for the sale of lands shall be in writing, and that such writing express the consideration and be subscribed by the party by whom the sale is to be made, or by his agent lawfully authorized. The authority of the agent may be conferred by parol; neither a written authority or an authority under seal is required. 2 R. S. 135, §§ 8, 9; McWhorter & Baldwin v. McMahan, 10 Paige, 386; Lawrence v. Taylor, 5 Hill, 107. It results from the foregoing authorities that the counterpart of the agreement executed by Henry Worrall under seal was binding on his principal, although his authority to execute it was not conferred by deed. * * *

Decree of the Supreme Court reversed.

II. POWER OF ATTORNEY UNDER SEAL

(A) In General

LAWRENCE v. TAYLOR.

(Supreme Court of New York, 1843. 5 Hill, 107.)

Assumpsit. The declaration contained the common counts, and also counted upon a contract to convey land in the village of Toledo, Ohio. The contract was executed by one Pratt for Pratt & Taylor, a co-partnership. Pratt was now dead, and the action was against Taylor to recover back money paid to Pratt on the contract. Defendant claimed that Pratt was not properly authorized to act for him so as to make him liable. Verdict for plaintiff sustained.

COWEN, J.[12] There was no written authority to Pratt by which Taylor was bound. Had the subject of the contract been personal property belonging to the firm, no special authority would have been necessary; but at law it is otherwise as to land, whatever may be the rule in equity. Out of the court of chancery, real estate, though belonging to partners and employed in the partnership business—the title standing in their joint names—is deemed to be holden by them as tenants in common or joint tenants for all purposes. One cannot, in virtue of the partnership power, sell for the other. Coles v. Coles, 15 Johns. 159, 161, 8 Am. Dec. 231; Anderson v. Tompkins, 1 Brock. 456, 463, Fed. Cas. No. 365; 2 Bell's Com. 614; Story on Partner-

[12] Part of the opinion is omitted.

ship, 146 to 149. In order to bind Taylor, therefore, a special authority was necessary for the particular transaction.

If a parol authority was sufficient, I am not prepared to say that here is not evidence of such an authority actually subsisting when the contract was executed. If, after a man has agreed to sell my property and has signed my name, I claim an interest in the sale, it is by no means to be taken for granted that upon such a claim a jury would not be warranted in saying I told the man to affix my signature. It seems the proof of some authority was considered so plain at the trial that the counsel for the defendant declined going to the jury upon it. In the Court of Chancery, perhaps, the mere partnership in these lands would have been sufficient to render the contract binding on Taylor. See Story on Partn. 129 to 132, and the note. They were treated as partnership property by the contract; and in admitting the validity of that and claiming under it, Taylor in the same breath admitted that the lands belonged to the firm. In equity they would, if in truth belonging to the firm, have been treated as personal estate (Id.); and that court without any thing more might have decreed a specific execution by both partners. Such being the equity of the case, it seems to me it would not have been a rash presumption, from what Taylor said to Macy and Smith, that Pratt was expressly instructed by Taylor to affix the copartnership name.

It was sufficient, however, if the proof showed a ratification of the sale by Taylor; and I think it showed so much, at least, very clearly. Here was a written contract to convey in the name of the firm, made as of property belonging to it. The plaintiff promised to pay the money to "Pratt & Taylor," on a contract to which the name of the firm was subscribed by Pratt. First $10,000 and afterwards $2,000 were received by Pratt on the contract. Of Taylor's common interest in the land there is no dispute, and he repeatedly claimed in the hearing of third persons, that he had an interest in the contract; a contract under which money had been and was yet to be paid to Pratt in the names of the two as joint payees. This was evidence of a positive acquiescence and adoption of the contract by Taylor; and if there be no objection to such an authority being by parol, both must be considered as joint receivers.

It was said for Taylor that the authority, not being written, was void by the statute of frauds. But neither the New York nor Ohio statute requires that the authority should be in writing. Both are in this respect like the English statute, which, though it require that an agent to convey real estate should be appointed by writing, omits that requisite when the contract is executory, i. e. to convey at a future day. 2 R. S. 69 (2d Ed.) §§ 6, 8, 9; Sugd. on Vend. 120, 121 (Brookf. Ed. of 1836), and the cases there cited; 3 Wooddes. 428; Story on Ag. 51, and note (2); Lloyd's Pal. on Ag. 158 to 160; 2 Kent's Com. 613 (4th Ed.). The statute of frauds draws the distinction on its face

between conveying, and contracting to convey lands. In the former case the agent must be made by writing; in the latter a writing is not required, but the books all concur that the appointment may be by parol. The Ohio statute, made an exhibit, is the same in this respect with our own.

An authority, by adopting the transaction, may as well be conferred where the question of agency arises under the statute of frauds, as under the common law. The cases to this effect are cited in Davis v. Shields, 24 Wend. 325. See also Story on Ag. 240, and the cases there cited. Such adoptive authority relates back to the time of the transaction, and is deemed in law the same to all purposes as if it had been given before. Story on Ag. 234, § 239; Id. 237, § 242.

If the writing given by the agent be under seal, and that be essential, another rule comes in independently of the statute of frauds. The authority must be of equal dignity, or the contract can not operate. Nor can a specialty executed by attorney operate as such in any case, unless his power be under seal. Story on Ag. 50, § 49; 2 Kent's Com. 613, 4th Ed. Yet even in such case, it does not follow that it shall not operate at all. If the contract may be made without deed, the seal shall not prevent its enuring as a simple contract, though the authority be by parol, or merely implied from the relation between the principal and agent; as if they be partners. Story on Partn. 179; Anderson v. Tompkins, 1 Brock. 462, Fed. Cas. No. 365, per Marshall, C. J. This doctrine has no connection with the question of what shall be a sufficient agency under the statute of frauds.[18] * * *

(B) Power to Fill Blanks in a Deed

SHEPPARD'S TOUCHSTONE, p. 54.

Every deed well made must be written, i. e. the agreement must be all written before the sealing and delivery of it; [or as part of the same transaction, and as a cotemporaneous act, or, at latest, while the deed is in fieri;] for if a man seal and deliver an empty piece of paper or parchment, albeit he do there withal give commandment that an obligation or other matter shall be written in it, and this be done accordingly, yet this is no good deed.

[18] As sustaining the older and stricter rule as to sealed authority to make a sealed instrument, see Gordon v. Bulkeley, 14 Serg. & R. (Pa.) 331 (1826).

CRIBBEN v. DEAL.

(Supreme Court of Oregon, 1891. 21 Or. 211, 27 Pac. 1046, 28 Am. St Rep. 746.)

Suit in equity to set aside a deed of general assignment, in which by parol authority an agent had inserted the name of the assignee after the deed had been signed, sealed and acknowledged, but before delivery.

LORD, J.[14] [After stating the facts and quoting Sheppard's Touchstone, said of the doctrine there laid down:] * * * This is founded upon that ancient and technical rule of the common law that the authority to make a deed, or to alter or fill a blank in some substantial part of it, cannot be verbally conferred, but must be created by an instrument of equal dignity. As the deed was under seal, to alter or complete it by the insertion of the name of the grantee required the authority to be under seal. So firmly rooted was this principle that it mattered not with what solemnities a deed may have been signed and sealed, unless the grantee's name was inserted, and delivery was made to him, or some one legally authorized under seal, it was a nullity. It imposed no liability on the party making it, nor conferred any rights upon the party receiving it; it was, in fact, no deed. Hence it was held that parol authority to fill a blank with the name of a grantee could not be conferred without violating established principles of law and rendering the deed void.

This doctrine still prevails in England. It is true that in the case of Texira v. Evans, cited in Master v. Miller, 1 Anstr. 225, Lord Mansfield held otherwise, but this was in effect overruled in Hibblewhite v. McMorine, 6 Mees. & W. 200, on the ground that an authority to execute a sealed instrument could not be given by parol, but must be given by deed, although this latter case seems more or less trenched upon by the decision in Eagleton v. Gutteridge, 11 Mees. & W. 465, and by Davidson v. Cooper, Id. 778, and in West v. Steward, 14 Mees. & W. 47. But the rule has never been universally accepted in this country, and, however the holding of some courts may be, still the better opinion and the prevailing current of authority is that when a deed is regularly executed in other respects, with a blank left therein for the name of the grantee, parol authority is sufficient to authorize the insertion of the name of such grantee, and that, when so filled out and delivered, it is a valid deed.

It is true that Chief Justice Marshall, in U. S. v. Nelson, 2 Brock. 74, Fed. Cas. No. 15,862, felt bound to follow the ancient rule, but

[14] Part of the opinion is omitted.

his opinion clearly indicates that he felt that the authority to fill a blank in an instrument under seal should be held to be valid. He says: "The case of Speake v. U. S., 9 Cranch, 28, 3 L. Ed. 645, in determining that parol evidence of such assent may be received, undoubtedly goes far towards deciding it, and it is probable that the same court may completely abolish the distinction in this particular between sealed and unsealed instruments." Again: "If this question depended on those moral rules of action which in the ordinary course of things are applied by courts to human transactions, there would not be much difficulty in saying that this paper ought to have the effect which the parties at the time of its execution intended it should have." And he concludes with this statement: "I say with much doubt, and with a strong belief that this judgment will be reversed, that the law on the verdict is, in my opinion, with the defendants."

The rule was purely technical, and the outgrowth of a state of affairs and condition of the law which does not now exist. The reason of the law is the life of it, and when the reason fails the law itself should fail. At the present day the distinction between sealed and unsealed instruments is fast disappearing, and the courts are gradually doing away with them. As Judge Redfield said: "But it [the rule] seems to be rather technical than substantial, and to found itself either on the policy of the stamp duties, or the superior force and sacredness of contracts by deed, both of which have little importance in this country; and the prevailing current of American authority and the practical instincts and business experience and sense of our people are undoubtedly otherwise." Redf. R. R. p. 124.

In Drury v. Foster, 2 Wall. 24, 17 L. Ed. 780, the court says: "Although it was at one time doubted whether parol authority was adequate to authorize an alteration or addition to a sealed instrument, the better opinion of this day is that the power is sufficient." Again, in Allen v. Withrow, 110 U. S. 119, 3 Sup. Ct. 517, 28 L. Ed. 90, the court says: "It may be, and probably is, the law in Iowa, as in several states, that the grantors in a deed conveying real property, signed and acknowledged, with a blank for the name of a grantee, may authorize another party by parol to fill up the blank." "But," he continues, "there are two conditions essential to make a deed thus executed in blank operate as a conveyance of the property described in it: The blank must be filled by the party authorized to fill it, and this must be done before or at the time of the delivery of the deed to the grantee named." In the case at bar these conditions were fulfilled.

In Inhabitants of South Berwick v. Huntress, 53 Me. 89, 87 Am. Dec. 535, the court held that a party executing a deed, bond, or other instrument, and delivering the same to another as his deed, knowing there are blanks in it to be filled necessary to make it a perfect instrument, must be considered as agreeing that the blanks may be thus filled after he has executed it. In delivering the opinion of the court, Kent, J., said: "The rule invoked is purely technical. Practically

there is no real distinction in this matter between bonds and simple contracts. There is no more danger of fraud or injury or wrong in allowing insertions in a bond than there is in allowing them in a promissory note or bill of exchange, and in neither can unauthorized alterations be made with impunity. Considering that the assumed difference rests on a mere technical rule of the common law, we do not think that the rule should be extended beyond its necessary limits, viz., that a sealed instrument cannot be executed by another, so that its distinguishing characteristic as a sealed instrument is in question, unless by an authority under seal."

Likewise, in Bridgeport Bank v. New York, etc., R. Co., 30 Conn. 274, Ellsworth, J., said: "Nor can any reason be assigned, which is founded in good sense, and is not entirely technical, why a blank in an instrument under seal may not be filled up by the party receiving it, after it is executed, as well as any other contract in writing, where the parties have so agreed at the time. In either case, the contract, when the blank has been filled, expresses the exact agreement of the parties, and nothing but an extreme technical view, derived from the ancient law of England, can justify the making of any distinctions between them." * * *

The court, after citing other American cases to the same effect, sustained the decree dismissing the bill.[15]

(C) Statutes Abolishing Sealed Requirements

SWARTZ v. BALLOU.

(Supreme Court of Iowa, 1877. 47 Iowa, 188, 29 Am. Rep. 470.)

Action to recover possession of land. Defendant claimed under one Davis, who held a deed which had been perfected in every respect by plaintiff, except that no grantee was named. Plaintiff sent this instrument to one Louther, who inserted the name of Davis as grantee. Plaintiff denied the authority of Louther to do what he had done.

SEEVERS, J.[16] [After stating the facts, and holding that Louther had at least implied authority by parol to fill in the grantee's name:] * * *

[15] The modern view is upheld in an able opinion by Mitchell, J., in State v. Young, 23 Minn. 551 (1877). The same view is taken in Lafferty v. Lafferty, 42 W. Va. 783, 26 S. E. 262 (1896), and in Bridgeport Bank v. N. Y. & N. H. R. Co., 30 Conn. 231 (1861). That authority to fill blanks in a deed must be conferred by power under seal is held in Mosby v. Arkansas, 4 Sneed (Tenn.) 324 (1857), citing the leading case of Hibblewhite v. McMorine, 6 M. & W. 200, in which the English court, per Parke, B., overruled the earlier case of Texira v. Evans, decided by Lord Mansfield, and cited in 1 Anst. 228 (1792).

[16] Part of the opinion is omitted.

II. It must be remembered that the deed, in its imperfect condition, was fully delivered to Louther. Whether authority may be conferred in express terms by parol to insert the name of a grantee in a deed perfect in all other respects, or that it may be implied from the acts and conduct of a grantor as between him and a purchaser in good faith, are questions which have been largely discussed, and the authorities are not in accord on the subject.

These questions first came before this court in Simms v. Hervey, 19 Iowa, 273, and are there elaborately considered, and the authorities referred to by Dillon, J. It is unnecessary to restate the arguments or make another citation of the authorities, except to say it is apparent the rule that such authority cannot be conferred rests largely, if not entirely, on the common-law doctrine in relation to instruments under seal, such doctrine being that such authority could only be conferred by instrument under seal.

Seals having been abolished by statute in this state, and, therefore, not necessary to the validity of a conveyance of real estate, it would seem, as the reason for the rule has ceased, that the rule itself should not be further recognized. The exact question in the present case was not determined in Simms v. Hervey. It is true, the writer of the opinion seems to have concluded the better rule would be to deny that such authority could be conferred by parol. It is certain, however, the court did not concur in this view. This is apparent from the opinion, and the subsequent case of Owen v. Perry, 25 Iowa, 412, 96 Am. Dec. 49, the opinion in which was written by Wright, J., and who concurred in the conclusion reached in Simms v. Hervey. See, also, Devin v. Himer, 29 Iowa, 297; Clark v. Allen, 34 Iowa, 190. It may be said the facts in none of these cases present the questions in the case at bar, yet it will be found difficult to draw a distinction in legal effect between the present case and Owen v. Perry.

Without entering into a discussion of the reasons, and referring to authorities at greater length, we conclude, as the result of our investigation, that the decided weight of modern authority, and reason, is in favor of the rule announced by the Supreme Court of the United States in Drury v. Foster, 2 Wall. 24, 17 L. Ed. 780. It is there said: "If a person competent to convey real estate sign and acknowledge a deed in blank, and deliver the same to an agent with an express or implied authority to fill up the blank and perfect the conveyance, its validity could not be well controverted. Although it was at one time doubtful, whether a parol authority was adequate to authorize an alteration or addition to a sealed instrument, the better opinion at this day is the power is sufficient." See, also, the late cases of Van Etta v. Evenson, 28 Wis. 33, 9 Am. Rep. 486; Field v. Stagg, 52 Mo. 534, 14 Am. Rep. 435; Schintz v. McManamy, 33 Wis. 299.

The contrary rule was adopted in California, in the recent case of Upton v. Archer, 41 Cal. 85, 10 Am. Rep. 266. No authorities are cited except Story and Dunlap's Paley on Agency, and it is said

the case comes within the "sixth section of the statute of frauds." Whether the statute of frauds of California is different from that of this and other states, we are not advised.[17] * * *

Affirmed.

(D) Deeds as Equitable Contracts to Convey

MORROW v. HIGGINS.

(Supreme Court of Alabama, 1856. 29 Ala. 448.)

Bill for injunction to restrain an action at law to recover land, for the conveyance of the legal title, and for general relief. Complainant had purchased the land of an agent, who by the authority of a letter from the owner had executed to complainant a deed. Error from a decree dismissing the bill.

WALKER, J. The letter exhibited with complainant's bill, and made a part of it, was a clear authority to sell the land. Wilson v. Troup, 7 Johns. Ch. 25; [Herbert v. Hanrick] 16 Ala. 581.

"It may be asserted, as a general rule, that in all cases, where an agent has contracted within the sphere of his agency, and the principal is not by the form of the contract bound at law, a court of equity will enforce it against the principal upon principles ex æquo et bono." Story on Agency, 209, § 162. Although the deed executed by the agent in this case may be ineffectual as a conveyance of the legal title, because the authority of the agent was not given by a written instrument under seal, it may be upheld in chancery as evidence of a contract to sell. Story on Agency, 55, § 49; Cocke v. Campbell & Smith, 13 Ala. 286; Welsh v. Usher, 2 Hill, Eq. 167 [29 Am. Dec. 63]; Dubois v. Delaware & H. Canal Co., 4 Wend. 285; Story on Agency, § 160, notes.

The principles above laid down are conclusive in favor of the equity of the appellant's bill; and therefore the decree of the court below is reversed, and the cause remanded, at the costs of the appellee.

[17] On the effect of statutes abolishing distinctions between sealed and unsealed instruments, see, also, Streeter Co. v. Janu, 90 Minn. 393, 96 N. W. 1128 (1903).

(E) Signature in the Principal's Presence

LEWIS v. WATSON.

(Supreme Court of Alabama, 1892. 98 Ala. 479, 13 South. 570, 22 L. R. A. 297, 39 Am. St. Rep. 82.)

McCLELLAN, J.[18] This is a statutory action for the recovery of a certain lot of land in the town of Andalusia. Watson is plaintiff, and Lewis, as administrator of one Holley, deceased, is defendant. Plaintiff derives title from one Dixon by deed appearing to have been executed in 1866. Defendant claims title through Watson, under a sale and conveyance by the sheriff to his intestate in 1875, made in satisfaction of certain judgments against Watson, and also by virtue of an adverse possession on the part of the intestate and himself subsequent to said sale and conveyance.

1. Some rulings were made on the trial in respect of Watson's title to the land prior to the sheriff's sale and conveyance of it, as his property, to Holley, and upon testimony in relation thereto. These are of no importance in the case, and, whether erroneous or not, in the abstract, need not be considered, since the defendant—claiming, as he does, under that title, and having recognized its validity by purchasing at the sheriff's sale, and now further recognizing it by a reliance upon the acquisition of it through that sale, and upon adverse possession since that time under the color of title, with which, at least, he was invested by the conveyance then made by the sheriff—is not in a position to impeach Watson's original title. Ware v. Dewberry, 84 Ala. 568, 4 South. 404; Houston v. Farris, 71 Ala. 570; Tennessee & C. R. R. Co. v. East Alabama Ry. Co., 75 Ala. 516, 525, 51 Am. Rep. 475.

2. The evidence as to the execution of the deed by the sheriff to Holley was that of the probate judge of the county, and is as follows: "That J. A. Thompson, the sheriff, could not write his name, and that he [the witness] frequently wrote in the sheriff's office for said Thompson; that he indorsed the levies on the execution here in evidence, and wrote the deed of Thompson, as sheriff, to Alfred Holley, dated May 3, 1875; that said deed and indorsements on said levies are in his handwriting; that said J. A. Thompson was present when said deed was written; that it was written in the sheriff's office, at Thompson's instance, and under his direction; that, after the deed was written, Thompson told him to sign his name, as sheriff, to the deed, which he did, and then, as judge of probate, took Thompson's acknowledgment to the deed, and carried it into the probate office, and afterwards recorded it; * * * and that some one came and got the deed from the probate office after it was recorded, but don't now remember who it was."

[18] Part of the opinion is omitted.

It is not entirely clear, on this testimony, that Thompson was actually and immediately present when his name was subscribed to the deed by Fletcher, by his direction; but, manifestly, there was room for an inference to be drawn to that effect by the jury. If he was so present, as the jury might have found, the subscription to the instrument was as efficacious as if he had been able to write his name, and with his own hand had written it, or he being unable to write his name, as if he had made his mark, and the words, "his mark," had been written against it, and the signature thus made attested by two witnesses. This on the principle that where the grantor is present, and authorizes another, either expressly or impliedly, to sign his name to the deed, it then becomes his deed, and is as binding upon him, to all intents and purposes, as if he had personally affixed his signature. The reason for the doctrine is thus stated by Shaw, C. J.: "The name being written by another hand, in the presence of the grantor, and at her request, is her act. The disposing capacity, the act of mind, which are the essential and efficient ingredients of the deed, are hers; and she merely uses the hand of another, through incapacity or weakness, instead of her own, to do the physical act of making a written sign. To hold otherwise would be to decide that a person having a full mind, and clear capacity, but, through physical inability, incapable of making a mark, could never make a conveyance or execute a deed." Gardner v. Gardner, 5 Cush. 483, 52 Am. Dec. 740; 1 Devl. Deeds, §§ 232, 233; Kime v. Brooks, 9 Ired. 218; Frost v. Deering, 21 Me. 156; Videau v. Griffin, 21 Cal. 390; Rev. St. Me. 1857, p. 56; Lovejoy v. Richardson, 68 Me. 386; Bird v. Decker, 64 Me. 551. * * *

For errors in the trial, reversed and remanded.

SECTION 5.—RATIFICATION

I. DEFINITION

ELLISON v. JACKSON WATER CO. et al.

(Supreme Court of California, 1859. 12 Cal. 542.)

Action to recover $48,154.14 for the construction of a ditch, or canal, under a contract with the water company. Bayerque held a mortgage on the ditch, and plaintiff claimed that, to induce him to complete the construction, Bayerque had adopted and ratified the contract. Judgment against defendants, and Bayerque appealed.

FIELD, J.[19] [After stating the facts, and disposing of the case against the company:] * * * As against the company, the judg-

[19] Part of the opinion is omitted.

ment for damages must be affirmed. It is only necessary, then, to determine the effect of the alleged "adoption and ratification" of Bayerque, and the validity of the lien asserted upon the ditch.

It cannot in strictness be said that Bayerque "adopted and ratified" the contract between the plaintiff and the company. These terms are properly applicable only to contracts made by a party acting or assuming to act for another. The latter may then adopt or ratify the act of the former, however unauthorized. To adoption and ratification there must be some relation, actual or assumed, of principal and agent. No such relation existed between the company and Bayerque; the contract between it and Ellison was not made in Bayerque's name, or for his benefit, or upon any authority from him. What the plaintiff, however, intends by these terms, is this: That Bayerque assumed the obligations of the company to Ellison upon the contract, or in other words, guaranteed the performance of the contract on the part of the company. In examining, then, the evidence contained in the record, we find nothing which establishes or even tends to establish any undertaking upon which Bayerque can be personally charged. * * *

Reversed as to Bayerque, and remanded.[20]

FIRST NAT. BANK OF FT. SCOTT v. DRAKE.

(Supreme Court of Kansas, 1883. 29 Kan. 311, 44 Am. Rep. 646.)

Action to recover money claimed to have been wrongfully appropriated by Drake while acting as cashier of the bank. He owned four-fifths of the stock, and appropriated as salary and for other purposes about $6,000, on the assumption that the bank was his and he could appropriate its assets as he pleased. Later he sold his stock, and the new officers claim that these sums should have been part of the assets. Defendant claimed that the bank books showed the facts, that the directors are charged with knowledge of what is on the books, and so had either authorized, or else ratified his acts. Judgment for defendant on demurrer to plaintiff's evidence.

BREWER, J.[21] [After holding that as to him the directors are not charged with the knowledge which is essential to ratification:] * * * But what is ratification? Counsel for plaintiff in error say it is the acceptance by a principal of the acts of one who, without original authority, acted with third parties, in the name of such principal; that

[20] To the same effect is Pittsburgh & Steubenville R. Co. v. Gazzam, 32 Pa. 340, 347 (1858) holding: "The relation of principal and agent is necessarily implied by the term 'ratification.' Ratification of a contract is an agreement to adopt an act performed by another for us." See, also, Mattocks v. Young, 66 Me. 459 (1876). But compare Greenfield Bank v. Crafts, 4 Allen, 447 (1862).

[21] Part of the opinion is omitted.

it is therefore only a branch of the doctrine of principal and agent. This is too limited. Burrill, in his Law Dictionary, says that "ratification is the confirmation of a previous act done either by the party himself, or by another; that it is the confirmation of a voidable act"; and cites as authority Story, Ag. §§ 250, 251, and also 2 Kent, Comm. 237. One of those citations treats of the relations of principal and agent; the other, of the confirmation of the acts of an infant by himself after becoming of age. Bouvier, in his Law Dictionary, gives similar scope to the meaning of ratification. We think, therefore, it will not do to say that it is strictly a branch of the doctrine of principal and agent. It is the confirmation of a voidable act. It is entirely immaterial what that is which renders the act voidable; whether a lack of present power to make a valid contract, as in the case of infancy, or because of fraud and misrepresentation on the part of the other contracting party, or because it is the unauthorized attempt of an assumed agent to bind his principal. Wherever there is a voidable act, confirmation of that act by the party assumed to be bound is in law a ratification.[22] * * *

On the ground that the evidence should have been submitted to the jury, reversed and remanded for a new trial.

SCHREYER v. TURNER FLOURING MILLS CO.

(Supreme Court of Oregon, 1896. 29 Or. 1, 43 Pac. 719.)

Action to recover money loaned to the promoters of defendant corporation prior to its incorporation.

WOOLVERTON, J.[23] [After disposing of another point:] * * * The defendant, while it may not have been in esse at the date fixed by the complaint, yet it could, at any time after its organization, by adoption, make the contract its own. It has been said that the adoption of a former contract is the making of a contract as of the date of the adoption. McArthur v. Printing Co., 48 Minn. 322, 51 N. W. 216, 31 Am. St. Rep. 653. In their primary signification, there is a manifest distinction between "adoption" and "ratification." The one signifies to take and receive, as one's own, that with reference to which there existed no prior relation, either colorable or otherwise; while the other is a confirmation, approval, or sanctioning of a previous act, or an act done, in the name or on behalf of the party ratifying, without sufficient or legal authority,—that is to say, the confirmation of a voidable act. But, as the terms relate to contracts, some lexicographers treat them as synonymous. Rapalje thus defines "adopt—adoption": "Of contract. To

[22] In Gallup, Trustee, v. Fox, 64 Conn. 491, 30 Atl. 756 (1894), the court held that "ratification is the adoption of a previously formed contract." This broad view of ratification is approved in Hartman v. Hornsby, 142 Mo. 368, 44 S. W. 242 (1897).

[23] Part of the opinion is omitted.

adopt a contract is to accept it as binding, notwithstanding some defect which entitles the party to repudiate it. Thus, when a person affirms a voidable contract, or ratifies a contract made by his agent beyond his authority, he is said to adopt it." See Rap. & L. Law Dict. 31. See, also, And. Dict. Law, 36. Now, as regards a contract made or an obligation incurred by the promoters of a corporation in the name of, or for and in behalf of, a contemplated corporation it would seem that an adoption or a ratification thereof by the corporation after it had developed into a legal entity would mean one and the same thing, and would be accomplished by one and the same process. True, the promoters cannot be the agents of an unborn corporation; but, where they have assumed to act for it, and to contract in its name, the approval and confirmation of such acts by the corporation, when organization has been duly accomplished, are but the ratification of the acts of an unauthorized agent. And the result is the same, whether we call it "adoption" or "ratification." [24]

But it is not very material here to determine whether, as relating to contracts, these terms are synonymous, or are capable of being thus distinguished, as they might be were the statutes of frauds or limitations involved. Suffice it to say, authorities are not wanting which hold them to mean one and the same thing. See 4 Thomp. Corp. § 5321, and Stanton v. Railroad Co., 59 Conn. 285, 22 Atl. 300, 21 Am. St. Rep. 110. * * *

Judgment for plaintiff affirmed.

STEFFENS v. NELSON et al.

(Supreme Court of Minnesota, 1905. 94 Minn. 365, 102 N. W. 871.)

Action to foreclose a mechanic's lien on defendant's property.

JAGGARD, J.[25] [After stating the facts and passing upon another point:] * * * 2. The plaintiff Steffens had no office; he had placed the number of his residence on his cards and billheads. The agent of the contractor called there in Steffens' absence, gave his wife a check of the contractor, dated ahead, for the amount of Steffens' claim, and directed her to sign a receipt. She signed that receipt, "Peter Steffens, Maria Steffens." She had no express authority from her husband so to do. This receipt was taken by the contractor to the

[24] In McArthur v. Times Printing Co., 48 Minn. 319, 51 N. W. 216, 31 Am. St. Rep. 653 (1892), the contract was oral and not to be performed within a year from the date of the agreement between the plaintiff and the promoters of the corporation. The court held that there was not a ratification by the corporation, for this would have related back to the time of the agreement with the promoters, at which time the corporation was not in existence. Moreover, such a contract would have come within the statute of frauds, and so have failed for not being in writing. But the corporation, by accepting the services after it came into existence, had "adopted" the contract, thereby making it date from the time of the adoption, and so not within the statute.

[25] Part of the opinion is omitted.

owner and agent of the mortgagee, and was present at the time of settlement with the contractor about noon on Saturday, April 12th. On the afternoon of that day the wife gave her husband the contractor's check, and explained that she had to sign a paper for it. The husband took the check and deposited it; that check was never paid.

The wife, like another person, may be made an agent for her husband, and as such impose upon him obligations by his authority, express or implied, precedent or subsequent. Hopkins v. Mollinieux, 4 Wend. 465; Benjamin v. Benjamin, 15 Conn. 347, 39 Am. Dec. 384; Willingham v. Simons, 1 Desaus. (S. C.) 272.

The proper decision of the question thus presented depends upon consideration of a neglected distinction between ratification and estoppel.[26] Lord Coke said: "The name 'estoppel' or 'conclusion' was giv-

[26] See, also, Blood v. La Serena Land & Water Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252 (1896), showing the importance of the distinction between ratification and estoppel when the mode of ratification is prescribed by statute. In Forsyth v. Day, 46 Me. 176 (1858), May, J., puts it thus: * * * When a person assumes authority to act, when in fact no such authority exists, and the assumed principal lies by and sees his name used under such circumstances, to the prejudice of innocent parties, and does not subsequently intentionally ratify or adopt those acts, still he may, under certain circumstances, be estopped from denying such authority. If a man will remain silent when he ought to speak, he will not be permitted to speak when he ought to remain silent. In such cases, as the authorities cited in defence fully show, it must appear, before the assumed principal can be charged, that the other party was induced to act, or did act to his own prejudice, by reason of the acts and conduct of the party attempted to be charged, or, in other words, on the faith that such acts and conduct were in fact what they assumed to be. It would be a reproach to the law, if a man could be permitted to lie by and see another act to his injury, upon the faith of his conduct, and acts which he knew were calculated to mislead him, and then turn round and say that he did not intend that which his conduct and his acts fairly indicated. No instruction upon this point was asked or given. The jury were further instructed that if Daniel, after he had knowledge that his name had been put upon the note in suit, as a maker, ratified and adopted the same, he would be bound thereby, although his name was originally placed upon said note without authority. The soundness of this instruction is not questioned. The words ratified and adopted as contained in it, seem to have been used as synonymous, and, in fact, a ratification is but the adoption of an act purporting to be the act of the party adopting it. * * * A contract necessarily implies, in its making, the assent of the parties to be bound by it, and such assent cannot exist in fact without corresponding intention. A contract, therefore, cannot exist without the intention of the party, either express or implied, to make it. It is not his contract until he has in some way intentionally assented to it. He may, however, by his conduct, as we have already seen, bind himself so far that he will be estopped to deny the validity of the contract. So, also, in the case of a subsequent ratification or adoption of a contract, made in his name without authority, such ratification or adoption cannot exist, in fact, without or against the intention of the party to be bound by it. The party, however, may, by his conduct, estop himself from denying an intention to ratify or adopt it. The distinction between a contract intentionally assented to, or ratified in fact, and an estoppel to deny the validity of the contract, is very wide. In the former case, the party is bound, because he intended to be; in the latter, he is bound notwithstanding there was no such intention, because the other party will be prejudiced and defrauded by his conduct, unless the law treat him as legally bound. In the one case, the party is bound because this contract contains the necessary ingredients to bind him, including a consideration. In the other, he is not

en because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth." However much this definition may have been criticised as vicious (Everest & Strode on Estoppel, 9–16; Bigelow on Estoppel, 5), it is a brief statement of the effect of the essential principle of estoppel, viz., "that, whenever one of two innocent persons must suffer by the act of a third, he who enables such third person to occasion the loss must sustain it." Lickbarrow v. Mason, 2 T. R. 63; 1 Smith, Leading Cas. 759; Ewart on Estoppel, 9. Ratification, on the other hand, means confirmation. "To ratify is to give sanction and validity to something done without authority." Evans, Principal and Agent (Bedford's Ed.) 90. The underlying principle upon which liability for ratification attaches is that he who has commanded is legally responsible for the direct results and for the natural and probable consequences of his conduct, and that it is immaterial whether that command was given before or after the conduct.

The substance of estoppel is the inducement to another to act to his prejudice. The substance of ratification is confirmation after conduct. "This is enough," said Mr. Bigelow, "to indicate that there may be danger in using the term 'estoppel' freely. It is common enough at present to speak of acquiescence and ratification as an estoppel. Neither the one nor the other, however, can be more than part of an estoppel, at best. An estoppel is a legal consequence—a right—arising from acts or conduct, while acquiescence and ratification are but facts presupposing a situation incomplete in its legal aspect, i. e., not as yet attended with full legal consequences. The most that acquiescence or ratification can do—and this either may under circumstances do—is to supply an element necessary to the estoppel, and otherwise wanting, as, e. g., knowledge of the facts at the time of making a misrepresentation. But each stands upon its own grounds, and must be made out in its own way, not necessarily in the way required by the ordinary estoppel by conduct." Bigelow on Estoppel (5th Ed.) pp. 456, 457. And see Reinhart on Agency, 101.

An unauthorized act may be made to operate by ratification as an estoppel upon the person in whose behalf it was done. That ratification presupposes knowledge on the part of such person ratifying. If he intentionally ratify what another has done for him without authority, and actually or constructively knows also of the circumstances connected with the unauthorized acts which are the basis of the estoppel, he should clearly be held bound thereby. See Dimond v. Manheim, 61 Minn. 178, 63 N. W. 495.

In this case the acceptance of the check given to plaintiff by his wife operated to ratify the receipt signed by her for him. In the eyes of

bound for these reasons, but because he has permitted the other party to act to his prejudice under such circumstances, that he must have known, or be presumed to have known, that such party was acting on the faith of his conduct and acts being what they purported to be, without apprising him to the contrary."

the law, at least, he knew that this receipt would be used as evidence of the payment of the debt by the contractor to whom it was delivered. He is responsible for the direct results and the natural and probable consequences of the act he has ratified. His situation is not therefore different, in law, from that of other creditors who signed receipts before the date of settlement, and who, as he did also, accepted and now retain the check of the contractor. He is not entitled to recover because of his ratification. See Ewart on Estoppel, 133, 137, 139.

The judgment appealed from is affirmed, except as to the plaintiff, Steffens, and the defendants Delamater & Son. As to them, let judgment be entered in accordance with this opinion.

II. The Act Ratified

ALEXANDER v. WADE.

(St. Louis Court of Appeals, Missouri, 1904. 106 Mo. App. 141, 80 S. W. 19.)

Wade offered to sell to Hays and Rodgers his stock of merchandise. The latter knew there was a debt for the stock, and refused to buy unless Wade would deposit with the bank $1,800 to pay his commercial creditors. To this Wade consented, and a deposit of $1,750 and some duebills was made as the "Chas. Wade Fund." Out of this fund the bank had paid all but $635.08 to commercial creditors of Wade, when Alexander, who was not such a creditor, commenced suit by attachment against Wade and had the bank garnished. The bank alleged that it had no interest in the fund, which it held for creditors, and asked to be protected in disbursing it according to the agreement. The above parties interpleaded, each claiming the fund.

Bland, P. J.[27] [After passing upon some minor and technical matters:] * * * 3. The arrangement under which the $1,750 were deposited in the bank by Wade is out of the ordinary. The deposit was made on the demand of Hays and Rodgers, yet neither of them knew who Wade owed, or what particular firms or individuals would be benefited by the deposit. They undertook to act for Wade's commercial creditors as a class—that is, for the creditors to whom he was indebted for the goods they were purchasing from him—and not for all his creditors, nor for his creditors generally. Their primary motive was, perhaps, to avoid any imputation of fraud to themselves, in having made the purchase of the goods with knowledge that Wade was largely indebted for their purchase price. Whatever may have been their motive, their action was not only lawful, but commendable, and the contract which they made with Wade in respect to the deposit was one which his creditors might lawfully have made with him, and

[27] Part of the opinion is omitted.

therefore might ratify after it was made, although Hays and Rodgers had no authority from the creditors to make it.

As is said by Mechem on Agency, at section 112: "It is therefore the general rule that one may ratify the previous unauthorized doing by another in his behalf of any act which he might then and could still lawfully do himself, and which he might then and could still lawfully delegate to such other to be done." In Suddarth v. Lime Company, 79 Mo. App. 592, it was held that, if A. had no authority to contract for B., yet if B. ascertained that he had so contracted, and ratified the act, he was bound by the contract. In McCracken v. City of San Francisco, 16 Cal. 591, Field, C. J., said: "To ratify is to give validity to the act of another. A ratification is equivalent to previous authority. It operates upon the act ratified in the same manner as though the authority had been originally given." See, also, Ruggles v. County of Washington, 3 Mo. 497; Summerville v. Railroad, 62 Mo. 391; Hartman v. Hornsby, 142 Mo. 368, 44 S. W. 242; Bank v. Hughlett, 84 Mo. App. 268.

The creditors for whose benefit the deposit was made, being possessed with the power to make the contract themselves in their own behalf,[28] might thereafter ratify the contract made by Hays and Rodgers, although the latter were without authority to act as their agents, and the ratification would operate upon the deposit as though Hays and Rodgers had authority, as agents of the creditors, to contract for the deposit for the purpose for which it was made. It is admitted that the interpleaders are commercial creditors of Wade, and hence are creditors for whose benefit the deposit was made. By their interplea they have ratified the act of Hays and Rodgers, and occupy the same situation in respect to the deposit as if it had been made for their benefit under a contract with their authorized agent or with themselves, and, being for their benefit, ratification will be presumed. Kingman & Co. v. Cornell-Tebbetts Co., 150 Mo. 282, 51 S. W. 727. * * *

Judgment for interpleaders affirmed.

MEMPHIS & C. R. CO. v. SCRUGGS.

(Supreme Court of Mississippi, 1874. 50 Miss. 284.)

Appeal from a decree of specific performance of an award. One J. W. Scruggs made a contract with appellant company to erect a hotel and eating house on the right of way. He later sold this to his wife. Under the terms of the contract the parties later desired to

[28] In Shepardson v. Gillette, 133 Ind. 125, 31 N. E. 788 (1893), it was held that a board of school trustees could not ratify a tax levy by the trustees of the civil town, because the act was not one which originally the school trustees possessed the power to do. See, also, McCracken v. San Francisco, 16 Cal. 591 (1860), per Field, J.

terminate the relations, and submitted to arbitrators the amount the company should pay. They awarded $31,666.66.

PATON, C. J.[29] [After holding that an award by arbitrators was binding:] * * * It is contended by counsel for appellants that M. J. Wicks, the president of the Memphis and Charleston Railroad Company, had no authority to enter into the submission on behalf of said company. We think the resolution passed by the board of directors of the company on the 25th day of January, 1871, conferred the authority upon the president to submit to arbitration as a mode of ascertaining the value of the property by disinterested parties, as provided in the original contract. On that day the minutes of the board of directors show "it was resolved that the president is hereby authorized to receive the hotel at valuation as provided for by said contract." The appellants being a corporation aggregate, a mere artificial being, could act only through the instrumentality of an agent or attorney. A power to "agree with the proprietor" of land for the purchase was held to authorize an agreement to pay such sum as arbitrators should award. Alexandria Canal Company v. Swann, 5 How. (U. S.) 83 [12 L. Ed. 60]. So we think the authority conferred by the board of directors upon the president to receive the hotel at the valuation of disinterested parties, clothed him with the power to refer to arbitration. And the appearance of the appellees before the arbitrators, by their agents and counsel without objection to the reference, amounts to a ratification of the act of the agent, and estops them from making any objection to the submission after the award was made. Where the principal, upon a full knowledge of all the circumstances of the case, deliberately ratifies the acts, doings or omissions of his agent, he will be bound thereby as fully, to all intents and purposes, as if he had originally given him direct authority in the premises, to the extent which such acts, doings or omissions reach. Story on Agency, 283, § 239.

At common law, however, there is a distinction between the ratification of acts which are void and the ratification of those which are voidable. In the former case, the ratification is inoperative for any purpose whatever; in the latter, full validity is given to the acts. Acts which are illegal, immoral or against public policy fall within the former class. For, in such cases, the original contracts or acts being void, ought not to be allowed to acquire any validity from their being subsequently confirmed; since the same noxious qualities adhere to the ratification as existed in the original transaction. But whatever may be the force of this distinction in the former class of cases, properly understood, it is not applicable to cases of agency, where a party assumes to act, not for himself but for another, without any authority whatsoever, or by an excess of the authority delegated to him, in cases where the principal may lawfully do the act. In all such cases, if the

[29] Part of the opinion is omitted.

principal subsequently ratifies the act, he is bound by it, whether it be for his detriment or for his advantage. And a ratification once deliberately made, with full knowledge of all the material circumstances, cannot be recalled. Story on Agency, § 242.

As the corporation may lawfully be a party to a submission to arbitration, and as this can be effected only through an agent, it follows that the submission of the agent, although it may be in excess of authority, may be ratified by the corporation, as well by its acts as by express confirmation. And this we think was done by its appearance before the arbitrators by its agent and attorney, without objection to the authority of the arbitrators. This conduct and act on the part of the railroad company was a recognition of the authority of the arbitrators, and amounted to a ratification thereof.[30] * * *

Decree affirmed.

HENRY CHRISTIAN BUILDING & LOAN ASS'N v. WALTON.

(Supreme Court of Pennsylvania, 1897. 181 Pa. 201, 37 Atl. 261, 59 Am. St. Rep. 636.)

Scire facias sur mortgage. Appeal from judgment for defendant. Plaintiff was attempting to collect a balance due on a $1,000 mortgage. Defendant denied having signed it, and the jury found his signature was a forgery.

FELL, J. The distinction between the power to ratify acts void because of a fraud affecting individual interests only and the power to ratify acts which involve a public wrong has been carefully defined and preserved in our decisions. The right to avoid a contract on the ground of fraud is a privilege given to the injured party for his own protection, and it may be waived; but he cannot give validity to an illegal contract. The earlier cases which held that all contracts vitiated by fraud are insusceptible of confirmation, are, in effect, overruled by Pearsoll v. Chapin, 44 Pa. 9, and Negley v. Lindsay, 67 Pa. 217, 5 Am. Rep. 427. The distinction between the cases pointed out in the opinions in Shisler v. Vandike, 92 Pa. 447, 37 Am. Rep. 702, and Lyon v. Phillips, 106 Pa. 57, is this:

Where the transaction is contrary to good faith, and the fraud affects individual interests only, ratification is allowed; but where the fraud is of such a character as to involve a crime the adjustment of which is forbidden by public policy, the ratification of the act from which it springs is not permitted. Forgery does not admit of ratification. A forger does not act on behalf of, nor profess to represent, the person whose handwriting he counterfeits; and the subsequent

[30] See, also, Daughters of American Revolution v. Schenley, 204 Pa. 572, 54 Atl. 366 (1903); Rawlings v. Neal, 126 N. C. 271, 35 S. E. 597 (1900); Boutelle v. Melendy, 19 N. H. 196, 49 Am. Dec. 152 (1848).

adoption of the instrument cannot supply the authority which the forger did not profess to have. "A forged bond or note obviously wants the essentials of a contract, because the intention is not to bring the minds of the obligor and obligee together, but to practice a fraud on both." Hare, Cont. p. 285.

All of the assignments of error which were insisted upon at the argument relate to the instruction given to the jury that, if the mortgage upon which the action was founded was a forgery, there could be no ratification of it, and that no act of the defendant thereafter could make it binding upon him. There can be no doubt of the correctness of the first part of this instruction, and, in view of the evidence, the whole of the instruction was free from error. Magee, who committed the fraud, was the accredited agent of the building association, and represented it in the preparation of the mortgage. He may have represented the defendant in other matters, but there was not the slightest evidence of his agency for the purpose of executing the mortgage. Nor was there evidence of any act of the defendant upon which to base an equitable estoppel.

The attempt to bring the case within the principle of the decision in Garrett v. Gonter, 42 Pa. 143, that a deed or contract executed by a professed agent, acting under a pretended authority, may be confirmed, failed for want of proof. The judgment is affirmed.

WILSON v. HAYES.

(Supreme Court of Minnesota, 1889. 40 Minn. 531, 42 N. W. 467, 4 L. R. A. 196, 12 Am. St. Rep. 754.)

Action by Wilson to enforce his right of redemption. The owner of the property, Douglas, had given to Wilson a note for $5,000, secured by mortgage, which note Wilson had negotiated and later repurchased. A prior mortgage had been foreclosed, and the certificate of sale assigned to Hayes. Wilson now claimed the right to redeem as mortgagee of the subsequent mortgage. It appeared that Wilson had altered the note given him by Douglas by erasing the word "annually," and inserting the word "quarterly," so as to make the interest payable quarterly, instead of annually.

MITCHELL, J.[81] [After disposing of other defenses in plaintiff's favor, and ordering a new trial for errors in the instructions of the court below:] * * * With reference to a new trial, it becomes proper to consider the effect of Douglas' so-called ratification of the alleged alteration. The court found that upon the discovery of it he denounced the alteration as fraudulent and unauthorized, and did not acquiesce therein. This is not justified by the evidence. While it appears that, upon being shown the note by the bank,—then the holder,—he asserted that it had been altered since he delivered it; yet, so far

[81] Part of the opinion is omitted.

from repudiating it, according to his own admissions, he repeatedly paid interest on it, voluntarily and without objection. If the alteration was capable of ratification, this would, according to all the authorities, amount to a ratification or adoption, whichever it may be called. If the alteration was a mere spoliation by a third party, or if made by the holder by mistake or accident or innocently, and without fraudulent intent, so that it did not destroy the note, or at least did not extinguish the debt, of which it was the evidence, it would not invalidate or affect the mortgage, which can only be discharged by the payment or extinction of the debt secured by it. In such case the question of ratification would be wholly immaterial. But suppose the alteration was fraudulently made, amounting in law to a forgery. The question remains, could this be subsequently ratified by Douglas so as to make the note in its altered form his contract?

The question whether a forgery is capable of being ratified, so as to create a liability on the forged instrument, in the absence of circumstances constituting an estoppel in pais, is one upon which there is almost as much conflict of authorities as upon that of burden of proof and presumption, already considered. Some of the cases holding the negative of the question place the doctrine upon grounds of public policy; others, upon the ground that ratification involves the relation of agency, and that ratification can only be effectual when the act is done by the agent avowedly for or on account of the principal; that the very nature of ratification presupposes the act done for another, but without competent authority, and hence can have no application to a forgery, for a forger never acts or assumes to act for another; others put it upon the ground that, in the absence of any new consideration, the ratification or adoption of the forged instrument would be a mere nudum pactum.

The cases holding a forgery capable of ratification take the ground that, so far as considerations of public policy are concerned, the ratification of forgeries should stand on the same footing as that of other contracts, and should be held valid, unless made in consideration of compounding the felony, or for some other illegal consideration; that as to the want of authority it can make no difference whether the unauthorized act was or was not a forgery; that this want of authority is the very thing which the ratification cures, and to which the maxim applies, "Omnis ratihabitio retrotrahitur et mandato priori æquiparatur;" that the ratification is "dragged back and made equivalent to a prior command"; that a ratification is not a contract, but an adoption of one previously made in the name of the ratifying party, and requires no consideration. See Brook v. Hook, 6 L. R. Exch. 98; McHugh v. Schuylkill County, 67 Pa. 391, 5 Am. Rep. 445; Shisler v. Vandike, 92 Pa. 447, 37 Am. Rep. 702; Owsley v. Philips, 78 Ky. 517, 39 Am. Rep. 258; Ferry v. Taylor, 33 Mo. 334; Workman v. Wright, 33 Ohio St. 405, 31 Am. Rep. 546; Bank v. Crafts, 4 Allen,

447; Wellington v. Jackson, 121 Mass. 157; Hefner v. Vandolah, 62 Ill. 483, 14 Am. Rep. 106; Forsyth v. Day, 46 Me. 176.

In the large majority of the cases usually cited in support of the proposition that a forgery can be ratified, it will be found that the question was presented in connection with circumstances creating an estoppel, or that there was in fact no fraudulent making or altering, but merely a lack of sufficient authority; and hence such cases are not in point. Where the ratification is made to a third party,—the holder of the instrument, who was not a party to the forgery,—we are not called upon to decide whether or not such ratification would create a valid liability on the instrument. All the authorities cited by appellant to the effect that a forgery may be ratified are of this class.[32] But we have found no case where it has been held that a forged instrument can be ratified so as to give the forger himself a right of action upon it. It is legally impossible in such a case that the relation of principal and agent could exist between the parties, for one man cannot be the agent of another to make a contract with himself. Hence it would seem that the doctrine of ratification can have no application to such a case.

If the entire instrument was a forgery, in the popular sense, it would require no argument to prove that a mere assent to or ratification of it in the hands of the forger would be a mere nudum pactum. But in law there is no distinction between a forgery in making and a forgery by altering. The altered instrument is not the contract of the maker, and in legal contemplation is as entirely a forgery as the other. If the alteration was not fraudulent, so that it did not destroy the instrument, or at least did not extinguish the debt, we can see how a subsequent assent to it would create a liability on the instrument as altered. Parties can alter their contract by mutual consent, and this requires no new consideration, for it is merely the substitution of a new contract for the old one, and this is of itself a sufficient consideration for the new. And what a party may assent to when done he may assent to afterwards, so as to bind himself, if there be a consideration to support it. But where there has been a fraudulent alteration of a written contract, which not only destroys the instrument but extinguishes the debt, it seems to us clear on principle that a subsequent assent to the alteration, given to the party who made

[32] That a forgery may be ratified, see Greenfield Bank v. Crafts, 4 Allen, 447 (1862). But the cases all agree that a ratification is not effective if made upon the consideration that the forger shall not be criminally prosecuted. Brook v. Hook, L. R. 6 Exch. 89, 40 L. J. Exch. 50, 24 L. T. Rep. N. S. 34, 19 W. R. 506 (1871). It has been doubted whether there can really be any other consideration that would lead one to assume an obligation on a note to which his name was forged. Henry v. Heeb, 114 Ind. 275, 16 N. E. 606, 5 Am. St. Rep. 613 (1888). Contra: Greenfield Bank v. Crafts, supra; Hefner v. Vandolah, 62 Ill. 483, 14 Am. Rep. 106 (1872). It is also well settled that the maker or indorser of the forged instrument will be liable when the elements of estoppel are present. Hefner v. Vandolah, 57 Ill. 520, 11 Am. Rep. 39 (1871); Workman v. Wright, 33 Ohio St. 405, 31 Am. Rep. 546 (1878), and other cases cited supra.

it, without any new consideration, is, in any view of the case, a mere naked promise. McHugh v. Schuylkill Co., supra; Workman v. Wright, supra; Owsley v. Philips, supra. Order reversed.

III. The Essentials of Ratification

(A) Agent Act As Agent

WILSON v. TUMMAN.

(Court of Common Pleas, 1843. 1 Dowl. & L. 513, 12 L. J. C. P., 306, 6 Man. & G. 236, 6 Scott, N. R. 894, 46 E. C. L. 235.)

Trespass de bonis asportatis. Plea, not guilty.

Tindal, C. J. This case comes before us, on the rule obtained by the plaintiffs, to enter a verdict for them against the defendant Tummon, for the sum of £2. 16s. 6d. if the court should think that the subsequent ratification made him liable as a trespasser for the original seizure. The seizure of the plaintiff's goods was made by an officer of some court, without any previous authority from Tummon, who appeared on the trial to be the plaintiff in some other suit, the precise nature of which did not transpire, but who was found by the jury not to have given any precedent authority to take the goods of the plaintiffs, but to have ratified the taking after it was made. The question, therefore, is a dry question of law, whether the subsequent ratification by the defendant Tummon of the seizure under such circumstances, is the same in its consequences as a precedent command given by him; and we think upon the authorities and upon the reason of the thing itself, that it is not. That an act done for another by a person not assuming to act for himself, but for such other person, though without any previous authority, would, indeed, become the act of the principal, if subsequently ratified by him, is the known and well established rule of law. In that case, the principal is bound by the act, whether it be for his detriment or advantage, or whether it be founded on a tort or a contract, if it be done by his previous authority.

There was this precise distinction taken in the Year Book, 7 Hen. 4, pl. 35, "that if the bailiff take a heriot, claiming property in it for himself, the subsequent agreement of the lord would not entitle him to be considered as the lord's bailiff at the time. But if he took it at the time as bailiff of the lord, and not for himself; although he did so without any command of the lord; yet the subsequent ratification by the lord would make him bailiff at the time." The same distinction is laid down by Anderson, C. J., in Godbolt's Reports, 189. "If one have cause to distrain my goods, and a stranger, of his own wrong, without any warrant or authority given him by the other, take my goods; not as bailiff or servant of the other, and I bring an action

of trespass against him, can he excuse himself by saying he did it as bailiff or servant? Can he so father his misdemeanor on another? He cannot," &c.

In the present case, the sheriff's officers, who were the original trespassers by taking the goods of the plaintiffs, were not the servants or agents of the defendant Tummon, but the agents of a public officer or minister, obeying the mandate of a court of justice. They did not assume to act at the time as agents or bailiffs of the then plaintiff, Tummon, but as the servants of another, namely, the sheriff, by executing the process directed to him by the court, and this forms the distinction between the present case and that of Parsons v. Loyd, which was relied on in the course of the argument. In the present case, the sheriff, or the sheriff's officers, seized under a valid process, but in Parsons v. Loyd the sheriff had acted, not under the authority of the court, but under the direction of the plaintiff in the original action, who, by suing out a void process, was in the same situation as if merely he had really directed the sheriff or his officers to make the arrest; and, on the latter supposition where a ca. sa. or a fi. fa. has been set aside for irregularity it becomes a nullity, and no doubt the sheriff acts as the servant, and by the command of the plaintiff, who sued it out, and who is consequently liable as principal for the act of his agent. If the defendant Tummon had directed the sheriff to take the goods of the present plaintiffs, under a valid writ requiring him to take the goods of another person, the previous direction would undoubtedly have made him a trespasser, on the principle that all who procure a trespass to be done, are trespassers themselves; the sheriff would be supposed not to have taken the goods merely under the authority of the writ, but as the servant of the plaintiff. But where the sheriff, acting under a valid writ, has seized the wrong person's goods, a subsequent declaration of the plaintiff in the action, ratifying and approving the taking, cannot alter the character of the original taking, and make it a wrongful taking by the plaintiff.

We think, therefore, that the defendant Tummon is not shewn to be a trespasser, and that the rule must be discharged.

Rule discharged.

WYCKOFF, SEAMAN & BENEDICT v. DAVIS et al.

(Supreme Court of Iowa, 1905. 127 Iowa, 399, 103 N. W. 349.)

Replevin to recover two typewriters. From a judgment for the defendant, plaintiff appeals.

DEEMER, J. One Dahlberg was plaintiff's agent at the city of Ottumwa for the sale of Remington typewriters. Defendants Davis and Rush were running a gambling house in Ottumwa, and Dahlberg was a frequenter of their establishment. In this gambling den he, Dahlberg, lost several hundred dollars of his employers' money. Dahlberg

had authority to sell and deliver typewriters in his particular locality, which included the city of Ottumwa, and to collect the purchase price therefor, and also to collect plaintiff's accounts in general within the territory allotted to him. In September of the year 1902, Dahlberg was short in his accounts with his employers to the extent of nearly $800. During this month he sent two checks to his principal purporting to represent some collections made by him. These checks were drawn on an Ottumwa bank, and, when returned, were dishonored by that bank. Plaintiff, through its other agents, was demanding a settlement by Dahlberg, and he, Dahlberg, went to defendant Davis for help. Davis finally loaned him $125, but insisted upon the delivery of the machines in question as security for the loan. To this Dahlberg yielded, and pursuant thereto delivered the machines to Davis, and at the same time, at Davis' request, he, Dahlberg, issued a receipt to Davis, in the name of the plaintiff company, showing payment of the sum of $205 in full for the two machines. Dahlberg did not receive more than $125, and he did not sell the machines to Davis. Davis says in a half-hearted way that he purchased the machines from Dahlberg, but his own testimony shows that the transaction was a pledge rather than a sale. With the money so received Dahlberg took up the two protested checks; but plaintiff had no knowledge as to where the money came from until after it had actually been received and credited. Thereupon one of plaintiff's agents went to Ottumwa to settle its affairs with Dahlberg, and then learned of the pledge of the machines. This action of replevin was then instituted, resulting in the judgment heretofore stated.

While many questions are argued, there is but a single proposition involved in the case, and that is, may plaintiff recover the machines from Davis without returning the $125 loaned by him to Dahlberg? Much is said about the rules applicable to gambling transactions, which has nothing to do with this case. Davis did not return, nor did Dahlberg receive, the $125 because of any change of heart on the part of Davis. No one pretends that this $125 was any part of the money won from Dahlberg. It is practically conceded that it was a loan from Davis to Dahlberg, induced to some extent, perhaps, by the thought that, as Dahlberg had lost his money in defendant's establishment, he, Davis, would be more likely than any one else to make the loan; but at the same time Davis was not conscience-smitten, for he demanded and received what was thought to be adequate security for the loan. But this loan was not made to plaintiff company, or to Dahlberg as agent of the company, but to Dahlberg individually, to enable him to meet a shortage due his principal. He had the right as an individual to borrow money of whom he would, but he had no authority to pledge the property of his employers as security for his individual debts. No agent has any such implied authority, and it is not claimed that any such express authority was given. Dahlberg told Davis that he was short in his accounts, and that he wanted the money to send to his em-

ployer. This being true, it is clear that the loan was not made either in fact or form to the company. Dahlberg did represent that the machines belonged to him individually, and that he had a perfect right to sell them; but he did not represent to Davis that he had authority to pledge them for a loan either to himself or to his principal.

Divested of all extraneous matter, the case is this: Dahlberg had possession of the machines as agent for the plaintiff, with authority to sell the same and to collect the purchase price. He was short in his accounts with his principal, and applied to Davis for a loan to make up this shortage, stating the facts to him, Davis. He represented to Davis that the machines were his, and that he had authority to sell them. Davis loaned $125 to Dahlberg individually, and took the machines as security for the loan, but, in order to make the transaction appear as a sale, insisted upon a receipt showing a sale rather than a pledge. Dahlberg did not, of course, own the machines, and he could not pledge them as security for his individual indebtedness. These being the facts, the ultimate conclusion is clear. Dahlberg having no express or implied authority to pledge the machines as security for his own debt, the transaction was not binding upon the plaintiff, and it may recover its property, unless it be that, by receiving the money as a result of the transaction, it ratified the same and is estopped from asserting its title. Of course, if Dahlberg had assumed to act as an agent for his company in securing the loan and pledging the machines, and plaintiff had received the money so obtained, it could not repudiate the transaction without returning the money.

But that is not this case. Here the loan was not made to the plaintiff either actually or ostensibly, but to Dahlberg in his individual capacity to enable him to meet a shortage to his company. The property was not pledged as the property of the company, but as Dahlberg's.[33] Dahlberg was indebted to his company on other accounts, and the loan was to enable him to make up his shortage to his principal. The company had the right to receive its money from its agent to apply on this shortage, no matter what its source, so long as the agent had not un-

[33] See, also, Watson v. Swann, 11 C. B. N. S. 756, 31 L. J. C. P. 210, 103 R. C. L. 756 (1862); Commercial Bank v. Jones, 18 Tex. 811 (1857); Pittsburgh & Steubenville R. R. v. Gazzam, 32 Pa. 340 (1858); Hamlin v. Sears, 82 N. Y. 327 (1880), holding that "the doctrine properly applies only to cases where one has assumed to act as agent for another." And it has been held that the agent must not merely assume, but that he must profess to act as agent. Ferris v. Snow, 130 Mich. 254, 90 N. W. 850 (1902); Mitchell v. Minn. Fire Ass'n, 48 Minn. 278, 51 N. W. 608 (1892); Keighley v. Durant, [1901] A. C. 240, 70 L. J. K. B. 662, 84 L. T. R. N. S. 777, 17 T. L. Rep. 527. In this last case it had been decided by the lower court, 1 Q. B. 629, 69 L. J. Q. B. 382, 82 L. T. Rep. N. S. 217, 16 T. L. R. 244, 48 Wkly. Rep. 476 (1900), that an undisclosed intention to act as agent was enough, though the agent had not openly professed to act for another. To the same effect is Hayward v. Langmaid, 181 Mass. 426, 63 N. E. 912 (1902). In Greenfield Bank v. Crafts, 4 Allen, 447 (1862), the court went so far as to hold that an act "may be ratified where there was no pretense of agency." This case involved the ratification of a forgery.

dertaken to act in his capacity as agent in obtaining the money. It was not bound to return the money, because its agent borrowed the same in his individual capacity and pledged his principal's property as security therefor, not as agent, but representing himself to be the owner thereof, with authority, in virtue of such ownership, to sell. The doctrine of ratification has no application to such a state of facts, for there is nothing to ratify; nothing was done on the company's behalf or in its name; the transaction was in the name of Dahlberg and for his individual benefit. In such cases the rules relating to ratification manifestly do not apply. Thacher v. Pray, 113 Mass. 291, 18 Am. Rep. 480; Mechem on Agency, § 127; Hamlin v. Sears, 82 N. Y. 327; White v. Sanders, 32 Me. 188.

We are then brought down to the simple question as to which of the parties to this litigation has the better title or right to the possession of the property. Plaintiff is conceded to have been the owner. If it has lost its title, it was through the act of Dahlberg, its agent. Dahlberg had no authority, either express or implied, to mortgage or pledge the property for a debt of his own. Bray v. Flickinger, 69 Iowa, 167, 28 N. W. 492; s. c., 79 Iowa, 313, 44 N. W. 554. Even if Dahlberg had assumed to mortgage the property as the property of his principal, he would not have had authority to do so under power to sell and collect the purchase price, although here the question of estoppel by ratification might perhaps arise. See, as supporting these conclusions: Mordhurst v. Boies, 24 Iowa, 99; Gilbert v. Baxter, 71 Iowa, 327, 32 N. W. 364; Van Vechten v. Jones, 104 Iowa, 436, 73 N. W. 1032; Edgerly v. Cover, 106 Iowa, 670, 77 N. W. 328.

None of the cases cited and relied upon by appellee are in point, for in each there was some act done by the agent in the name of or on behalf of his principal which was the subject of ratification. This is not true in the case at bar, and plaintiff was not obliged to see if there was any "taint on the money" which was paid it by its agent, Dahlberg, in satisfaction or part satisfaction of his account with it. Even if the money were tainted, there is no principle of either law or morals which would prevent the plaintiff from receiving it.

The judgment of the district court, which was evidently based upon the theory of ratification, is wrong, and it is therefore reversed.

(B) Existence of Principal

In re EMPRESS ENGINEERING CO.

(Chancery Division of the High Court of Justice, 1880. 16 Ch. Div. 125, 43 L. T. N. S. 742, 29 Wkly. Rep. 342.)

Glasier & Archer agreed with Cottier, who acted for a company, intended to be registered as a limited company, to be called the Empress Engineering Company, to sell to the company for £3,000. the right to manufacture and sell the Empress water motor. All costs, both before and after the company should have been registered, were to be borne by the company, including 60 guineas to Jones & Pride, solicitors, for the incorporation and registration of the company. This agreement the directors of the company, by resolution after the company was organized, ratified. On the winding up of the company, Jones & Pride put in a claim for the 60 guineas and other charges.

JESSEL, M. R. I must say that I do not see how it was possible for the Vice-Chancellor to have decided otherwise than he did. The contract between the promoters and the so-called agent for the company of course was not a contract binding upon the company, for the company had then no existence, nor could it become binding on the company by ratification, because it has been decided, and, as it appears to me, well decided, that there cannot in law be an effectual ratification of a contract which could not have been made binding on the ratifier at the time it was made, because the ratifier was not then in existence. It does not follow from that that acts may not be done by the company after its formation which make a new contract to the same effect as the old one, but that stands on a different principle. I am of opinion, therefore, that there was no contract binding the company to pay this £63. to Messrs. Jones & Pride.

Supposing, however, that there was, it is then contended that a mere contract between two parties that one of them shall pay a certain sum to a third person not a party to the contract, will make that third party a cesui que trust. As a general rule that will not be so. A mere agreement between A. and B. that B. shall pay C. (an agreement to which C. is not a party either directly or indirectly) will not prevent A. and B. from coming to a new agreement that next day releasing the old one. If C. were a cestui que trust it would have that effect. I am far from saying that there may not be agreements which may make C. a cestui que trust. There may be an agreement like that in Gregory v. Williams, 3 Mer. 582, where the agreement was to pay out of property, and one of the parties to the agreement may constitute himself a trustee of the property for the benefit of the third party. So, again, it is quite possible that one of the parties to the agreement may be the nominee or trustee of the third person.

As Lord Justice James suggested to me in the course of the argument that a married woman may nominate somebody to contract on her behalf, but then the person makes the contract really as trustee for somebody else, and it is because he contracts in that character that the cestui que trust can take the benefit of the contract. It appears to me, therefore, that on both the grounds mentioned by the Vice-Chancellor this claim cannot be supported.

There is another ground suggested, namely, that as the company has had the benefit of the registration they ought to pay for it. But the answer to that is this—that was not the claim brought forward. The claim brought forward was for an agreed sum of £63., and any order we make (I do not know whether it is necessary to express it) will not prejudice that claim, which is merely for an amount due for services the benefit of which has been taken by the company.

JAMES, L. J. I am entirely of the same opinion.

I think it is perhaps as well that we should say that Gregory v. Williams seems to be misunderstood. When that case is considered with the careful criticism with which the Master of the Rolls has examined it, it appears quite clear that there was there a transfer of property with a declaration of trust in favour of a third person, which was a totally different thing from a mere covenant to pay money to that person. As regards the other point, notwithstanding what was said by Vice-Chancellor Malins in Spiller v. Paris Skating Rink Company, 7 Ch. D. 368, it appears to me that it is settled, both in the Courts of Law and by us in the Court of Appeal in that case to which we have been referred of In re Hereford & South Wales Waggon & Engineering Company, 2 Ch. Div. 621, that a company cannot ratify a contract made on its behalf before it came into existence—cannot ratify a nullity.[34] The only thing that results from what is called ratification or adoption of such a contract is not the ratification or adoption of a quâ contract, but the creation of an equitable liability depending upon equitable grounds. It is inequitable for a man not to pay for the services of which he has taken the benefit. That was the only ground upon which we have held that, in that case, Walter & Head would have had a claim for services before the registration of the company, had not an equitable defense been effectually set up on the ground of a fraudulent concealment of the agreement.

JAMES, L. J. The appeal will be dismissed with costs. It will be without prejudice to any equitable claim on a quantum meruit. I may add, as the Master of the Rolls pointed out to me in the course of the argument, that in Gregory v. Williams, 3 Mer. 582, the man with

[34] To the same effect, see Melhado v. Porto Allegre, New Hampburg & Brazilian Ry. Co., Limited, L. R. 9 C. P. 503, 31 L. T. Rep. N. S. 57, 23 W. R. 57 (1874), holding that if a promoter has spent time and money in forming a company, and the company accepts the benefits of his efforts, the company cannot ratify so as to become liable, for at the time of the agreement it was non-existent and therefore incapable of contracting.

whom the contract was made was one of the plaintiffs, and the only defence there would have been misjoinder of plaintiffs, and that is a defence which the Court was not likely to view with much favour.

BATTELLE v. NORTHWESTERN CEMENT & CONCRETE PAVEMENT CO.

(Supreme Court of Minnesota, 1887. 37 Minn. 89, 33 N. W. 327.)

Before the incorporation of the defendant, the plaintiff had agreed with two of its promoters to buy a piece of real estate and to sell the same to the company. This he did, giving a mortgage back, and the company, when it was formed, assumed the mortgage. Default was made, and the mortgage was foreclosed; but the property did not sell for enough to pay the debt, and the plaintiff was held for the deficiency. He now sues to recover. From judgment for the plaintiff and an order refusing a new trial, the defendant appeals.

GILFILLAN, C. J. It is self-evident that a corporation is not bound by engagements of its "promoters," (i. e., those who bring about its organization,) assuming to contract for it in advance. It cannot have agents till it has an existence.[85] The promoters are not the corporation, and their contracts cannot be its contracts. This is so, though the promoters become, at the creation of the corporation, its only stockholders, directors, and officers. After it comes into existence and operation, it may, by adopting the engagements thus made for it in advance, make them its contracts, precisely as it might make similar contracts had no previous engagements been entered into. There can be no difference between its making a contract by adopting an agreement originally made in advance for it by promoters, and its

[85] In Rockford, R. I. & St. L. R. Co. v. Sage, 65 Ill. 328, 16 Am. Rep. 587 (1872), the court, while declining to say that a promoter cannot recover for services and expenses before the organization of the company, if the company afterwards accepts and receives the benefit of them, nevertheless regards it as more reasonable to hold services performed or expenses incurred prior to the organization as gratuitous, in view of the general good or private benefit expected to result from the objects of the corporation. The same court, in Wood v. Whelen, 93 Ill. 153 (1879), held that there could be no question of the right of directors to ratify and confirm the action of promoters of the corporation, and Bruner v. Brown, 139 Ind. 600, 38 N. E. 318 (1894), extended this power to ratify to contracts to pay promoters for their services. See, also, Stanton v. N. Y. & Eastern Ry. Co., 59 Conn. 272, 22 Atl. 300, 21 Am. St. Rep. 110 (1890); Paxton Cattle Co. v. First Nat. Bank of Arapahoe, 21 Neb. 621, 33 N. W. 271, 59 Am. Rep. 852 (1887), citing Low v. Conn. & Passumpsic Rivers R., 45 N. H. 370 (1864).

That a corporation, which with full knowledge of all the facts assumes and agrees to the terms or accepts the benefits of a contract made by its promoters, will be bound thereby, or at least will be estopped to deny its liability, has been often held. But this does not hold unless the evidence of such acceptance is clear. Buffington v. Bardon, 80 Wis. 635, 50 N. W. 776 (1891); Bell's Gap R. Co. v. Christy, 79 Pa. 54, 21 Am. Rep. 29 (1875). A corporation may ratify a contract made when it was a de facto corporation only. Whitney v. Wyman, 101 U. S. 392, 25 L. Ed. 1050 (1879).

making an entirely new contract. No greater formality can be required in the one case than in the other; and if it could make an entirely new similar contract, without the use of its seal, or without writing, or without formal action of its board of directors, it may also so adopt an agreement, assumed to be made for it in advance by promoters. It is not requisite that such adoption or acceptance be express, but may be shown from acts or acquiescence of the corporation or its authorized agents as any similar contract may be shown.

It is true that the relations between the promoters and the agents and shareholders may be such, or the engagements made in advance by the promoters be of such a character, that the matter of adoption will be scrutinized by the courts with great strictness. The highest degree of fairness is required. In this case no complaint can be made as to the fairness of the transaction. Not only did every stockholder and director and officer of the corporation, after it was formed, know that the property was conveyed to it upon the agreement that, when formed, it should assume and pay the indebtedness to which the property was subject, but each of them was a party to that agreement. After receiving the benefit of the previous engagement, and accepting and using the property in its business, knowing that, as part of the price of the property, the corporation was to pay the indebtedness, it can hardly be permitted now to deny its liability to pay it; and the same may be said as to the claim that, because plaintiff was a director, the agreement of the corporation, by its adoption of the previous arrangement with him, was not binding upon it. The rule that a contract between a director of a corporation and the corporation is voidable at the instance of the latter, or of its stockholders, cannot be applicable to a case where all interested in the corporation, its officers, directors, and stockholders, not only know of but consent to it, and where the property acquired by the corporation under the contract is kept and used by it, no one dissenting.

The evidence was sufficient to sustain a verdict for plaintiff, within the rules herein stated. Order affirmed.

(C) Act Done for the Principal

WATSON v. SWANN.

(Court of Common Pleas, 1862. 11 C. B. N. S. 756, 31 L. J. C. P. 210, 103 E. C. L. 756.)

Action on a policy of assurance on goods shipped on steamer La Plata, on which there was a loss by jettison. The further facts appear in the opinions.

ERLE, C. J. I am of opinion that this action cannot be sustained. It is an action of contract. It is important, therefore, not only to ascertain what is the subject of the contract, but who are the parties

to it; for, it is clear law that no one can sue upon a contract unless it has been made by him, or has been made by an agent professing to act for him, and whose act has been ratified by him. Now, here, the contract was not made by the plaintiff; nor did it purport to be made on his behalf; it purported to be made by Smith on his own behalf. And it is clear that the plaintiff never intended to ratify that contract in toto, but part of it only, viz., so much of it as was sought to be appropriated to him by Smith. A very wide extension has been given to the principle I have adverted to as to the parties to a contract, in respect of policies of insurance, viz., that persons who could not be named or ascertained at the time the policy is effected are allowed to come in and take the benefit of the insurance. But then they must be persons who were contemplated at the time the policy was made. Here, however, Watson was not and could not be contemplated as being a party to whose benefit the policy should enure, at the time it was effected. The policy was effected by Smith in December, 1860. He was not at that time employed by Watson. The first intimation he received from Watson that he wanted to effect an insurance, was received by him in January, 1861, when he was requested to take out on his behalf an open policy for £5000. against jettison on deck. Finding himself unable to effect such a policy as Watson required, he had recourse to the expedient of appropriating a part of his own contract to Watson.

No doubt, the principle contended for on the part of the plaintiff is one of considerable importance to the mercantile community. But I am clearly of opinion that Watson cannot sue upon this policy. It may be that Smith might maintain an action as trustee for the parties really interested: but it will be time enough to consider that if the question should arise. No case can be found of a running policy having been appropriated to cover a risk not contemplated at the time. Such a proceeding is entirely unknown to the law of contract. With the consequences we have nothing to do, even though the effect of our decision should be to throw doubt upon the validity of running policies. The cases to which the learned counsel for the plaintiff have referred seem to me to be entirely in conformity with our present decision. In Lucena v. Craufurd and Routh v. Thompson, the prizes were vested in the Crown; the Crown, therefore, was interested in the policies, and substantially they were effected on the behalf of the Crown: in both, the very risk insured against was the risk in respect of which the action was brought. Here, it is quite certain that the underwriters did not undertake this risk; and that, if asked to do so, they would have refused. I therefore think, that, upon the declaration and the fifth plea, denying that the policy was made for the use and benefit or on account of the plaintiff, the defendant is entitled to judgment.

WILLES, J. I am of the same opinion. To entitle a person to sue upon a contract, it must clearly be shown that he himself made it, or

that it was made on his behalf by an agent authorized to act for him at the time, or whose act has been subsequently ratified and adopted by him. The law obviously requires that the person for whom the agent professes to act must be a person capable of being ascertained at the time. It is not necessary that he should be named; but there must be such a description of him as shall amount to a reasonable designation of the person intended to be bound by the contract. In the present case, the policy was effected on goods "to be valued and declared as interest might appear." No person was pointed out at the time the policy was effected as the person who was to be the owner of the goods insured. Smith was professing to act for himself at the time of making the policy. Goods shipped on his own account, or possibly by him as agent for another person, would be covered by the policy. But a stranger who had given him no orders to effect a policy for him clearly cannot by any supposed ratification assume the benefit of the contract. The cases of administrators and of assignees of bankrupts stand upon a totally different footing. The doctrine of ratification involves this, that the act of ratification shall have reference to the time when the act was done which the supposed principal professes to ratify. To illustrate our opinion, we may refer to the case of an ordinary policy. In the ordinary policy, the broker who effects it declares that he does so as well in his own name as for and in the name and names of all and every other person or persons to whom the same death, may, or shall appertain, &c.: and the person who sues upon it must be either the broker by whom it is effected or the person on whose behalf it was intended to be effected. No subsequently acquired interest will give a stranger a right to sue upon the policy. * * *[36]

WILLIAMS and KEATING, JJ., also rendered opinions.

Rule nisi to direct a verdict for the defendant made absolute.

(D) Who may Ratify

FIRST NAT. BANK OF TRENTON v. GAY et al.

(Supreme Court of Missouri, 1876. 63 Mo. 33, 21 Am. Rep. 430.)

SHERWOOD, J.[37] Action on instrument in this form:

"$650.00 Trenton, Mo., May 13, 1874.

Ninety days after date we promise to pay to the order of Robert L. Gillilan, six hundred and fifty dollars, for value received, with interest after maturity, at the rate of ten per cent. per annum, at the First National Bank of Trenton, Mo.; and if not paid at maturity,

[36] See, also, Marsh v. Joseph, 1 Ch. 213, 66 L. J. Ch. 128, 75 L. T. Rep. N. S. 558, 45 W. R. 209 (1897).

[37] Part of the opinion is omitted.

and the same is placed in the hands of an attorney for collection, we agree and promise to pay an additional sum of ten per cent. as attorney's fee. Nathan Gillilan.
"Samuel Gay."

On the above instrument there was this indorsement:

"For value received, I assign the within note to First National Bank of Trenton, Mo., and waive protest, notice of protest, and demand of payment. Robert L. Gillilan."

The petition alleged, among other things, that in consequence of the non-payment of the instrument at maturity, it was placed in the hands of an attorney for collection, and asked judgment not only for the principal sum with interest, but also asked for four per cent. damages for non-payment, as well as ten per cent. damages as an attorney's fee.

In addition to other matters, the defendant, Nathan Gillilan, put in a plea of non est factum. A trial was had, resulting in a verdict for plaintiff and judgment accordingly. * * *

But while we may freely concede that all means necessary and proper for the accomplishment of the end were intended, yet this concession cannot be permitted to embrace the extraordinary means and measures resorted to by the son, in the present instance. These considerations conspicuously show the exceeding impropriety of giving the instruction above mentioned. The second instruction was equally erroneous as the first. The evidence of plaintiff's own witnesses, the officers of the bank, shows that the father, in proffering the use of his name, for the accommodation of the son, distinctly stated "that he and Robert were both good; that he did not wish to go out of the family for security, that there was no necessity for doing so." This language is susceptible of but one construction. It plainly indicates that while the father was willing to become the surety of his son, he at the same time desired to restrict that suretyship to the members of his family. And he had the undoubted right to so restrict his liability. And, as a necessary sequence therefrom, the son had no power to disregard these restrictions which were imposed on him.

These remarks are but the application of a very familiar doctrine respecting agents who possess only special and limited powers. Thus, an agent authorized to draw and indorse bills in the name of his principal, has no power to draw or indorse a bill in his own name, or in the joint name of himself and principal. Stainback v. Read, 11 Grat. 281, 62 Am. Dec. 648. A ruling similar to this in point of principle, was made in Mechanics' Bank v. Schaumburg, 38 Mo. 228. And it matters not whether the addition of the name of Samuel Gay to the note, prior to its delivery, affected the rights or interests of Nathan Gillilan injuriously or otherwise. He has the right to say, when ascertaining that his instructions have not been followed: "I never gave assent to this contract."

The instruction referred to was erroneous, therefore, as already stated, because there was not a particle of evidence tending to show

that Nathan Gillilan was willing, at the outset, to assume with Samuel Gay, or indeed any one else, outside of his family, a joint liability in the execution of any paper whatever, much less the instrument in suit. There are other errors in this instruction but we need not point them out, as they have been already passed upon in our remarks upon the first one given. And the errors we have pointed out were not aided or cured by the harmless platitude which the court of its own motion gave, "That, unless the jury find from the evidence in the case that Nathan Gillilan authorized Robert L. Gillilan to sign his (Nathan Gillilan's) name to the instrument in suit, the jury must find for the said Nathan Gillilan." But although it may be true that Nathan Gillilan did not give authority to sign his name to the instrument on which the claim of the plaintiff is based, yet it was doubtless in his power, upon full knowledge of what had been done, to give it the sanction of his approbation.

There have been many refinements adopted about this doctrine of ratification; refinements which savor more of subtlety than of sound judgment. With some exceptions, not necessary to be adverted to here, the general proposition is, however, undoubtedly correct, that *he who may authorize in the beginning, may ratify in the end.* This is a common sense view of the matter, easily understood, constantly acted and relied on, in the ordinary occurrences of daily life, and should not be frittered away by subtleties without soundness, and distinctions without difference. And there is, therefore, no force in the point urged on our attention, that there would have to be a new consideration in order to attach validity to a confirmatory act. No independent consideration is required in the case of an accommodation indorser, surety, etc., in the first instance, and it is difficult to see why anything more should be required on subsequent sanction than on original assent. Commercial Bank v. Warren, 15 N. Y. (1 Smith) 577, and cases cited.

The Supreme Court of Pennsylvania (McHugh vs. County, 67 Pa. 391, 5 Am. Rep. 445, and cases cited) has, it seems, uniformly held that there could be no ratification without a new consideration, where the original act was mala fide. But this court, in the case of Dow's Ex'r v. Spenney's Ex'r, 29 Mo. 386, where the point, indeed, was not expressly raised, but where there was no proof of a new consideration, held that ratification might occur, even where the ratifier's name had been *forged.* There is, however, no proof of bad faith in this case; so that the Pennsylvania decisions to which we have been cited, even if regarded as sound, would be inapplicable here.[38] * * *

Judgment reversed and cause remanded.

[38] It is, of course, a corollary to the principal case that a ratification can only be made when the party ratifying possessed the power to perform the act ratified. Marsh v. Fulton County, 10 Wall. 676, 19 L. Ed. 1040 (1870).

KELSEY v. NATIONAL BANK OF CRAWFORD COUNTY.

(Supreme Court of Pennsylvania, 1871. 69 Pa. 426.)

Plaintiff, a detective, sues in assumpsit to recover $5,000 reward for detecting the felon, who had robbed the bank of $150,000, and recovering the money. He offered to prove that the cashier had offered $5,000 reward in the presence of some of the directors, and that more than a majority of the directors with full knowledge sanctioned what the cashier had done. Further plaintiff testified that he arrested the clerk of the bank and recovered nearly all the money. He now brings error to the court of common pleas for a nonsuit.

WILLIAMS, J.[89] It is not necessary to decide whether the cashier ex officio had authority to offer the reward in question for the detection of the thieves that robbed the bank. If he had no authority, the bank is liable for the reward if the offer was acquiesced in and ratified by the directors. The law is well settled, that a principal who neglects promptly to disavow an act of his agent, by which the latter has transcended his authority, makes the act his own (Bredin v. Dubarry, 14 Serg. & R. 30); and the maxim which makes ratification equivalent to a precedent authority is as much predicable of ratification by a corporation as it is of ratification by any other principal, and it is equally to be presumed from the absence of dissent (Gordon v. Preston, 1 Watts, 387, 26 Am. Dec. 75).

It was accordingly held in Bank of Pennsylvania v. Reed, 1 Watts & S. 101, that though the authority of the cashier does not extend so far as to justify him in altering the nature of the debt due the bank, or in changing the relation of the bank from that of a creditor to that of an agent of its debtor, yet a subsequent acquiescence of the bank in such an exercise of power would be conclusive upon it. In delivering the opinion of the court, Rogers, J., said: "It is a very clear and salutary rule in relation to agencies, that when the principal, with the knowledge of all the facts, adopts or acquiesces in the acts done under an assumed agency, he cannot be heard afterwards to impeach them, under the pretence that they were done without authority, or even contrary to instructions. 'Omnis ratihabitio mandato æquiparatur.' When the principal has been informed of what has been done, he must dissent and give notice of it in a reasonable time; and if he does not, his assent and ratification will be presumed." If then the directors of the bank were informed that the cashier had offered the reward, it was their duty promptly to disavow the act, if they did not intend that the bank should be bound by it. If they had notice of the offer and did not dissent from it, their assent and ratification must be presumed. Nor was it necessary, in order to bind the bank by their acquiescence, that notice should have been given to the directors, when sitting in their official capacity as a board.

[89] Part of the opinion is omitted.

If they were personally cognisant of the offer made by the cashier, it was their duty to call a meeting of the board and disavow the act, if they were unwilling that the bank should be bound by it. It would be unjust to permit the plaintiff to spend his time and money for the detection of the thief, on the faith of the promised reward, and then to repudiate the offer, as unauthorized, when he had succeeded in apprehending the thief and restoring to the bank the stolen securities found on his person. The question of the bank's liability for the reward turns on the fact of notice and acquiescence. If the evidence, tending to show that the directors had notice of the offer and that they acquiesced in it, was sufficient to establish the fact, if believed, the case should have been permitted to go to the jury. We think that the evidence was sufficient, and that it should not have been withheld from them.

It tended directly to show that the cashier offered the reward at the instance of one of the directors, and upon his suggestion that "the directors would bear him out in it," and that the offer was made in the presence of three of the directors; and that the plaintiff "separately met all the directors and talked the matter over with them," with the exception of William Davis, Jr. If so, can there be any doubt that the evidence showing the directors' knowledge of the offer was sufficient to go to the jury? In a town like Meadville it could hardly have happened that the bank should have been robbed of so large an amount and that a reward should have been offered by the cashier for the detection of the thief, and telegraphed to the police headquarters at Cleveland, Erie and Pittsburg, without the fact being known to almost the entire community. And if so, the directors must have been informed of it. But whether so or not, the evidence touching the question was amply sufficient to go to the jury. * * *

Judgment reversed, and a procedendo awarded.[40]

[40] See, to the same effect, Moody & Meckelburg Co. v. Trustees of M. E. Church, 99 Wis. 49, 74 N. W. 572 (1896), citing Mechem on Agency, §§ 158, 167; also Oregon Ry. Co. v. Oregon Ry. & Nav. Co. (C. C.) 28 Fed. 505 (1886), and cases there cited.

RATIFICATION BY CORPORATIONS.—That a municipal corporation can ratify an unauthorized action of its agents, which the corporation could in the first instance have authorized, was held in Bell v. Waynesboro Borough, 195 Pa. 209, 45 Atl. 930 (1900). But this is only possible when the party ratifying possessed the power to perform the act ratified. A board of supervisors, with no power to vote or issue bonds without a vote of the county, cannot therefore ratify a subscription without a vote of the county, because they could not make a subscription in the first instance. Marsh v. Fulton County, 10 Wall. 676, 19 L. Ed. 1040 (1870).

And the state, upon the same principles as an individual, may ratify a contract, either by formal act of the Legislature, State of Wisconsin v. Torinus, 26 Minn. 1, 49 N. W. 259, 37 Am. Rep. 395 (1879); or by acquiescence by the Legislature after full knowledge of the terms of the unauthorized contract, and enjoyment of the benefits of it, Jewell Nursery Co. v. State, 5 S. D. 623, 59 N. W. 1025 (1894). The ratification, to be effective, must be made by the same agency of the state which would have had original power to do the act. State of Ohio v. Ex'r of Buttles, 3 Ohio St. 309 (1854).

TRUDO v. ANDERSON.

(Supreme Court of Michigan, 1862. 10 Mich. 357, 81 Am. Dec. 795.)

Trudo left his horse with one McAlister to be sold. While McAlister was absent, his employé, Miller, exchanged it for another horse. McAlister suspected that this other horse was stolen, which was the fact, but nevertheless sold him conditionally to one Gleason. Anderson loaned $30 to the party who had traded for plaintiff's horse, taking the horse as security. Plaintiff now brings replevin. Judgment for the defendant.

CHRISTIANCY, J.[41] [After ruling on a matter of jurisdiction:] * * * The Court found as a fact that the plaintiff, in July, 1860, was the owner of the horse in question; and to warrant the judgment in favor of the defendant, it must appear, first, that the property, or the plaintiff's right of possession, had been divested, or second, we must be satisfied that the Court below was right in holding that a demand of the property was necessary before the institution of the suit. To authorize the judgment on the first ground the Court must have found, as a fact, the ratification by the plaintiff of the exchange made by the servant of his agent, and of the subsequent conditional sale by McAlister of the horse received in exchange; for the simple authority of McAlister to sell the horse for the plaintiff would not have authorized the exchange if made by McAlister himself, much less when made by his servant; and the conditional sale of the horse received in exchange could in no way bind the plaintiff, unless ratified and adopted by him. But while the finding sets forth the particular facts and circumstances in evidence with more particularity than necessary, and is therefore thus far more in the nature of evidence than of a finding of facts, it fails entirely to find directly the fact of ratification, or any fact or state of facts which would, in law, constitute such ratification. Certain facts are set forth in reference to a conditional sale made by McAlister of the horse received by his servant in exchange for the plaintiff's horse; but these facts, though probably with others considered by the Judge as circumstances tending to the proof of ratification, cannot be treated as a finding of that fact by the Court. If admissible and sufficient to authorize the inference of ratification, they were certainly no more than mere evidence, and it was for him to draw the inference. A finding of facts should set forth the facts found, not merely the evidence tending to prove them. Upon a special verdict the Court can draw no mere inference of fact which the jury have failed to draw from the evidence. But we see nothing in this evidence which, without other facts not found, could even tend to the proof of ratification; as the plaintiff himself does not appear to have had any connection with the conditional sale, nor even to have been informed of it, either before or after the transaction.

[41] Part of the opinion is omitted.

And an agent cannot ratify an act done by himself or his servant beyond the scope of the agency, so as to bind the principal: otherwise an agent might enlarge his own powers to any extent without his principal's consent. * * *

Judgment reversed.[42]

(E) Knowledge of Facts

VALLEY BANK OF PHŒNIX v. BROWN.

(Supreme Court of Arizona, 1905. 9 Ariz. 311, 83 Pac. 862.)

Appeal from a judgment of the District Court in favor of the plaintiff and appellee.

CAMPBELL, J.[43] Plaintiff below, appellee here, was a depositor of the defendant bank. In December, 1902, the bank, by its president and manager, drew a check for $1,000 against plaintiff's deposit, and loaned that sum to one L. D. McClure, taking a promissory note payable to plaintiff, due in one year, and bearing interest at the rate of 10 per cent. per annum. McClure was a retail druggist, carrying on business in the city of Phœnix. As collateral security for the loan, he pledged a warehouse receipt for whisky in bond in Kentucky, and agreed to set apart a portion of his stock of goods, to be held by one F. H. Lyman, his attorney, as receiptor. The warehouse receipt was of small value. The goods to be set aside inventoried $1,042.07. A large part of them were of a perishable character. Mr. Lyman receipted for the goods, and saw some of the goods segregated from the stock, but was not requested by the bank to check them over, nor did he do so, nor was he requested to exercise more than a nominal control over them; the actual custody and control remaining in McClure. There was a verbal agreement between McClure and the bank to the effect that, should McClure desire to use any of the goods mentioned in the inventory, he could pay the bank the schedule price and take them.

About one month after the loan was made, plaintiff was called to the bank, and told by the president that he had loaned $1,000 of her money to McClure on "gilt-edged" security. This was the first knowledge she had of the transaction. She was not told the nature of the security, nor the manner in which it was held. Thereafter McClure

[42] See, also, Bullard v. De Groff, 59 Neb. 783, 82 N. W. 4 (1900). That an agent may ratify the unauthorized acts of another agent, if he could originally have authorized the subagent to do them, is held in U. S. Exp. Co. v. Rawson, 106 Ind. 215, 6 N. E. 337 (1886); State of Ohio v. Ex'r of Buttles, 3 Ohio St. 309 (1854). But if such original authority is lacking, then the first agent cannot bind his principal by a ratification of the acts of another agent. Ironwood Store Co. v. Harrison & Green, 75 Mich. 197, 42 N. W. 808 (1889). And certainly an agent has no power to ratify his own unauthorized acts. Britt v. Gordon, 132 Iowa, 431, 108 N. W. 319 (1906).

[43] Part of the opinion is omitted.

paid the interest monthly to plaintiff, who receipted to him for the same. During the month of March, 1903, the cashier of the bank suggested to plaintiff that she had better look over the securities connected with her loan, and handed the papers relating to them to her. These papers, with the exception of the receipt given by Lyman, are not in evidence. She did not examine the papers, but returned them at once to the cashier, who assured her that the securities were perfectly good. All of the papers remained with the bank. Some time thereafter, plaintiff attempted to negotiate a purchase of real estate, and told the broker of the McClure note. The broker, in response to her suggestion, and with a view to accepting the note if satisfactory in part payment, examined the note and securities, and declined to accept it; merely telling her that the note was not satisfactory. Shortly before the note became due, McClure failed in business. Investigation disclosed that of the goods supposedly set aside as security for plaintiff but a small portion remained. During this investigation plaintiff learned for the first time the precise nature of the goods pledged, and the conditions under which they were held. Shortly after learning the facts, she notified the bank that she repudiated the act of the bank in making the loan, tendered the interest she had received, offered to indorse the note to the bank without recourse, and demanded payment of the $1,000. The bank refused payment, and this action was brought.

The principal question requiring our attention is, did the plaintiff ratify the action of the bank in making the loan under such circumstances as to be binding upon her? The principles of law involved are clear. "No doctrine is better settled, both upon principle and authority, than this, that the ratification of an act of an agent previously unauthorized must, in order to bind the principal, be with full knowledge of all the material facts.[44] If the material facts be either suppressed or unknown, the ratification is treated as invalid, because founded in mistake or fraud." Owings v. Hull, 9 Pet. 607, 9 L. Ed. 246.

Speaking through Chief Justice Bigelow in the case of Combs v. Scott et al., 12 Allen, 493, the Supreme Court of Massachusetts say: "Ratification of a past and completed transaction, into which an agent has entered without authority, is a purely voluntary act on the part of the principal. No legal obligation rests upon him to sanction or adopt it. No duty requires him to make inquiries concerning it. Where there is no legal obligation or duty to do an act, there can be no negligence in an omission to perform it. The true doctrine is well stated by a learned text-writer: 'If I make a contract in the name of a person who has not given me an authority, he will be under no obligation to ratify it, nor will he be bound to the performance of it.' 1 Livermore on Agency, 44. See, also, Paley on Agency, 171, note

[44] See especially the opinion of Brewer, J., in First National Bank v. Drake, 29 Kan. 311, 44 Am. Rep. 646 (1883).

'o.' Whoever, therefore, seeks to procure and rely on a ratification is bound to show that it was made under such circumstances as in law to be binding on the principal, especially to see to it that all material facts were made known to him. The burden of making inquiries and of ascertaining the truth is not cast on him who is under no legal obligation to assume a responsibility, but rests on the party who is endeavoring to obtain a benefit or advantage for himself. This is not only just, but it is practicable. The needful information or knowledge is always within the reach of him who is either party or privy to a transaction which he seeks to have ratified, rather than of him who did not authorize it, and to the details of which he may be a stranger. We do not mean to say that a person can be willfully ignorant, or purposely shut his eyes to means of information within his own possession and control, and thereby escape the consequences of a ratification of unauthorized acts into which he has deliberately entered; but our opinion is that ratification of an antecedent act of an agent which was unauthorized cannot be held valid and binding where the person sought to be charged has misapprehended or mistaken material facts, although he may have wholly omitted to make inquiries of other persons concerning them, and his ignorance and misapprehension might have been enlightened and corrected by the use of diligence on his part to ascertain them." See, also, Story on Agency, § 243; Wheeler v. Northwestern Sleigh Co. (C. C.) 39 Fed. 347; 1 Am. & Eng. Enc. Law, 1190.

The trial court found as a fact that the plaintiff was not informed as to the character or value of the securities, and, after a careful consideration of the evidence, we are not prepared to say that it was not justified in so finding. A lack of such knowledge is a material circumstance, and a ratification without it is not binding, unless the ignorance resulted from willfulness and not mere carelessness. The inventory or other papers concerning the collateral held by the bank, with the exception of Mr. Lyman's receipt, are not in evidence, and we cannot say how much information plaintiff would have acquired had she examined them. We think the evidence shows the plaintiff to have been careless, but not willfully ignorant.[45] * * *

Judgment affirmed.

[45] But if the principal takes advantage of the unauthorized act, he cannot willfully and purposely shut his eyes to means of information within his possession and control, and seek to retain the benefits and at the same time repudiate the act. Johnson v. Ogren, 102 Minn. 8, 112 N. W. 894 (1907); Jones v. Atkinson, 68 Ala. 167 (1880), citing Meehan v. Forrester, 52 N. Y. 277 (1873). If, however, he accepts money lawfully due him, with no knowledge that it is the proceeds of an unauthorized act by the agent, he does not by retaining the money ratify such act. Smith v. Tracy, 36 N. Y. 79 (1867); Shull v. New Birdsall Co., 15 S. D. 8, 86 N. W. 654 (1901); Thacher v. Pray, 113 Mass. 291, 18 Am. Rep. 480 (1873); Lime Rock Bank v. Plimpton, 17 Pick. (Mass.) 159, 28 Am. Dec. 286 (1835), supra, 803, holding that money having no earmarks does not stand on the same grounds as chattels; Wheeler v. Northwestern Sleigh Co., 39 Fed. 347 (1889); Hamlin v. Sears, 82 N. Y.

MOYLE v. CONGREGATIONAL SOCIETY OF SALT LAKE CITY.

(Supreme Court of Utah, 1897. 16 Utah, 69, 50 Pac. 806.)

Action by Moyle, as assignee of the Burton-Gardner Company, against the defendant for $11,012.85, alleged to be due for work and materials in building the defendant's church building. The original contract was with Barber & Co.. Owing to dissatisfaction, this was assigned by the consent of the building committee to the Burton-Gardner Company. It was claimed by the latter that the written assignment was made merely to get rid of Barber & Co., and that the chairman of the building committee, one Hollister, now deceased, made an oral agreement with the Burton-Gardner Company to complete the church and be paid whatever it was worth. Plaintiff claimed that Hollister had ostensible authority to make the oral contract, and in any case the society, by accepting and keeping the building, had ratified the contract and was bound to pay in accordance with it. Judgment for plaintiff for $6,801.84 and interest.

MINOR, J. [After stating the facts and holding there was no implied authority in Hollister to make the oral contract:] * * * The trustees authorized the building committee to make a contract with Barber & Co. to build the church on the terms stated in the contract, and with no other persons. Neither the trustees nor the building committee ever directed any contract to be made with Burton or the Burton-Gardner Company to build the church, or to complete building it, except that which grew out of the written assignment. Nor has either body, or any member of it, ever knowingly ratified any contract with the Burton-Gardner Company to build the church. Nor does it appear that either of the bodies representing the church, and having authority to speak for it, or any member of it, except Hollister, had any notice or knowledge of any verbal contract between Hollister and the plaintiff company to complete the church, in violation of the written agreement made and agreed to by all the parties. When completed, the church paid the full contract price, together with extras, as provided for and agreed upon under the contract. These payments were mostly made to Burton, until after Hollister's death, and then, by the direction of Burton, they were paid to the Burton-Gardner Company, and many of the checks passed through Mr. Burton's hands. It is well established that the ratification of an unauthorized act of any agent, in order to be effectual and binding on the principal, must have been made with full knowledge of all material facts; and ignorance, mistake, or misrepresentation of any of the essential circumstances relating to the transaction alleged to have been ratified will

327 (1880); Heinzerling v. Agen, 46 Wash. 390, 90 Pac. 262 (1907); Marsh v. Joseph [1897] 1 Ch. 213, 66 L. J. Ch. 128, 75 L. T. Rep. N. S. 558, 45 W. R. 209.

absolve the principal from all liability, by reason of the supposed adoption or assent to the previously unauthorized acts of the agent. Baldwin v. Burrows, 47 N. Y. 199; Bennecke v. Insurance Co., 105 U. S. 355, 26 L. Ed. 990; Dupont v. Wertheman, 10 Cal. 354.

And, in adopting and ratifying what the principal had authorized the agent to do, he was not adopting and ratifying that which was unauthorized. Smith v. Tracy, 36 N. Y. 79. We are satisfied that the church did not, through its directors or building committee, ratify the alleged acts of Hollister. It is true, the church retains the structure built upon its real estate; but we know of no way by which the alleged work performed upon the church building can be segregated from it, and returned to the plaintiff. It does not follow that because the church used the building after its completion, thereby unavoidably having the benefit of the work and materials furnished, the church would therefore be liable for the value thereof. Mills v. Berla (Tex. Civ. App.) 23 S. W. 910; Baldwin v. Burrows, 47 N. Y. 199. We are of the opinion that the plaintiff offered no valid testimony to show that Mr. Hollister had authority to bind the defendant by the alleged parol contract. Nor was there any ratification of his alleged acts in that respect by the church, building committee, or trustees of the church, shown. The alleged verbal contract varies and contradicts the written contract and assignment by which the parties were bound, and that testimony concerning the verbal contract with Hollister was improperly received in evidence, and should have been stricken out on defendant's motion at the close of plaintiff's case.[46] * * *

Reversed and remanded.

THOMPSON v. LABORINGMAN'S MERCANTILE & MFG. CO.

(Supreme Court of Appeals of West Virginia, 1906. 60 W. Va. 42, 53 S. E. 908, 6 L. R. A. [N. S.] 311.)

Action by Thompson on a note for $382.39, signed "Laboringman's M. & M. Co., P. M. Murphy, Pres." Judgment for plaintiff. Reversed and judgment for defendant.

POFFENBARGER, J.[47] [After stating the facts:] * * * It is not pretended that Murphy had any inherent authority or power as president to borrow money, and execute the company's note therefor. That such authority is not possessed by the president of a corporation, in the absence of an express delegation thereof, has been determined by this court. Bank v. Kimberlands, 16 W. Va. 579; Third National Bank v. Laboringman's, etc., Co., 56 W. Va. 446, 49 S. E. 544. Nor is it pretended that he had any antecedent express authority from the board of directors to so bind the corporation.

[46] Other parts of this opinion are found post, pp. 342, 841.

[47] Part of the opinion is omitted.

The judgment rests upon two propositions, the first of which is that there is evidence which would justify a finding that the defendant, with full knowledge, allowed Murphy to so act and deal, in respect to its business, as to constitute a representation to the public of authority in him to borrow money on its account. The facts relied upon to sustain this proposition are of the same character as those set up in Third National Bank v. Laboringman's, etc., Co., and, in that case, they were deemed and held wholly insufficient for that purpose. They were almost contemporaneous in date with the transaction with Thompson. It does not appear that he had any knowledge of but one such transaction, namely, the first one had with George B. Thompson. Nothing in the testimony indicates that the directors of the corporation had any knowledge of this transaction subsequently had with George B. Thompson, or the one had with W. W. Golightly. In the absence of any knowledge of these facts on the part of the board of directors, there is no foundation for saying the corporation held Murphy out to the public as an agent authorized to borrow money for use in its business. A verdict of a jury, predicated upon such testimony, could not be sustained, and therefore the evidence is clearly insufficient upon a demurrer thereto.

The other view is that of ratification of the unauthorized act of the president. There is no claim of an express ratification. The contention is that it is a ratification by acquiescence and retention of benefits. As noted in the statement of the evidence, it does not appear that the account which was set off against the note at the time of its execution was due from the defendant company. Mr. Thompson's evidence goes no further than to say it was so represented to him by Murphy, and he acted upon that information. Whether the company received the benefit of the check given for the balance of the note does not in any way appear from the evidence. The alleged reception of benefits stands wholly upon the representations made to Mr. Thompson by Murphy. The check is not produced, so as to show whether it was payable to Murphy individually or to the defendant, nor if payable to the defendant, whether it was deposited to its credit or cashed by Murphy and the money used by him. Starting with the admitted fact that the act of Murphy in borrowing this money was outside of, and beyond, his authority, it would be contrary to legal principles to say that his representations or acts, relating thereto, are binding upon the company. What he said as well as what he did was beyond the scope of his authority, and it is well settled that, only such acts and declarations of an agent are binding upon his principal as were done and made within the scope of his authority. Had said sum of $200 been a debt due the defendant, it may be that it could have been rightfully paid to its president. This we do not decide. But it was borrowed money. The acquisition of it was an unauthorized act, and the custody of it was, therefore, necessarily not on behalf of the principal. Hence, the agent's possession of it raises no presumption,

and lays no foundation for an inference, that the principal received the benefit of it. * * *

This may not, however, be conclusive of the case. A principal may ratify the unauthorized act of his agent without having received the benefit thereof. It may be that the defendant did receive the money notwithstanding the lack of evidence here to show that fact. The authorities do not seem to hold the reception of benefits to be an essential element of ratification. Nor is any reason perceived why it should be. It is necessary, therefore, to consider the other evidence relied upon to show ratification. This consists of the silence of the defendant from March or April, 1901, when, it is claimed, the note was brought to the attention of the general manager and one or more of the directors, until the 5th of September, 1901, a period of probably five or six months. "Where an agency actually exists, the mere acquiescence of the principal may well give rise to the presumption of an intentional ratification of the act." Story on Agency, § 256. The authorities almost uniformly say that acquiescence after knowledge of an unauthorized act is evidence of ratification, and such acquiescence need not be for any considerable length of time. What length of time will depend upon the nature of the transaction and the situation of the parties affected or interested. "Silence of the alleged principal, when fully advised of what has been done in his behalf by one who attempts to act as his agent without authority, may be sufficient from which to infer a ratification of the unauthorized act." Lynch v. Smyth, 25 Colo. 103, 54 Pac. 634; King v. Rea, 13 Colo. 69, 21 Pac. 1084; Union M. Co. v. Bank, 2 Colo. 248; Bank v. Fricke, 75 Mo. 178, 42 Am. Rep. 397. "Where the relation of principal and agent exists, but in the particular transaction the agent has exceeded his authority, an intention to ratify will be presumed from the silence of the principal beyond a reasonable time after having knowledge of the transaction, if he has an opportunity to express his dissent." McGeoch v. Hooker, 11 Ill. App. 649. "It is a salutary rule, in relation to agencies, that when the principal is informed of what has been done, he must dissent, and give notice in a reasonable time, or otherwise, his assent to what has been done shall be presumed." Cairnes v. Bleecker, 12 Johns. (N. Y.) 300. To the same effect, see Bredin v. Dubarry, 14 Serg. & R. (Pa.) 30; Fuel Co. v. Lee, 102 Wis. 426, 78 N. W. 584; McLaren v. Bank, 76 Wis. 259, 45 N. W. 223; Hoosac M. & M. Co. v. Donat, 10 Colo. 529, 16 Pac. 157; Breed v. Bank, 4 Colo. 481; Smith v. Fletcher, 75 Minn. 189, 77 N. W. 800; Sheldon, etc., Co. v. Eickemeyer, etc., Co., 90 N. Y. 607; Alexander v. Cauldwell, 83 N. Y. 480; Phillips v. Lumber Co., 130 Cal. 431, 62 Pac. 749; Bank v. Railway Co., 117 Cal. 332, 49 Pac. 197; 4 Thomp. Corp. §§ 5286, 5288.

Occasionally a case is found which seems to conflict with the proposition just stated. Thus, in Railway Co. v. Jay, 65 Ala. 113, the court seems to have inclined to the view that silence and acquiescence, after

knowledge received, is not evidence of ratification, and that no duty rests upon the principal to disavow the unauthorized act of his agent, unless the party dealing with the agent would be misled to his injury by failure to repudiate the act properly or the act is in reference to a matter as to which, by the usage of trade, a prompt reply is demanded when notice is given. For this proposition, Smith v. Sheeley, 12 Wall. 358, 20 L. Ed. 430, and 2 Greenl. Ev. § 66, are cited. 2 Greenleaf on Evidence, § 67, seems to assert two propositions, the first of which is that mere silence after notice of an unauthorized act, with full knowledge of the circumstances, is evidence of ratification, but not conclusive; and the second, that if the silence of the principal is contrary to his duty, or has a tendency to mislead the other party to the transaction, it is conclusive. As an instance of this, the rule governing transactions among merchants, under which an act is deemed to be assented to, after the lapse of a reasonable time when notice thereof has been given is mentioned. This is a species of estoppel, rather than an instance of ratification by acquiescence, and it seems to be the principle which rules the case of Smith v. Sheeley. This distinction is marked in other cases. See Smith v. Fletcher, 75 Minn. 189, 77 N. W. 800; Lynch v. Smyth, 25 Colo. 103, 54 Pac. 634; Breed v. Bank, 4 Colo. 481.

That acquiescence, with full knowledge of the material facts attending an unauthorized act is evidence from which a ratification may be inferred, when no element of estoppel is involved, is made plain by a number of decisions. Where the president of a corporation, without authority of the board of directors, sold all of its personal property, and the purchase money was garnished in the hands of the vendee by a creditor of the corporation, and no steps were taken by the debtor corporation either to affirm or repudiate the act of its president, the silence of the corporation was held to be sufficient evidence of ratification of the unauthorized sale. Fuel Co. v. Lee, 102 Wis. 426, 78 N. W. 584. Where officers of a corporation, without authority, have given liens upon its property by mortgage, third parties, such as unsecured creditors, cannot impugn the transaction on the sole ground of want of authority in the officers. Moller v. Fiber Co., 187 Pa. 553, 41 Atl. 478; Cooper v. Potts, 185 Pa. 115, 39 Atl. 824; Ragland v. McFall, 137 Ill. 81, 27 N. E. 75. In these cases the only evidence of ratification is the mere silence and acquiescence of the principal.

These authorities may justify the position of counsel for the appellee in saying that acquiescence alone is evidence of ratification. The books assert the proposition over and over and contain numerous illustrations of it. But there is one element which enters into it that must not be lost sight of. When the circumstances are such as to call for the application of the law of estoppel, rather than the mere law of ratification, it may be that the principal can bind himself without full knowledge of all the material facts. The situation may be

such as to make it his duty to know. The means of knowledge may be at hand or within easy reach, and his relation to the third party such as to estop him from saying he is without knowledge. But, in the absence of such circumstances, the authorities are unanimous in holding that there can be no ratification by acquiescence, unless the principal has full and complete knowledge of all the material facts attending the unauthorized act. "Any ratification of an unauthorized act, in order to be made effectual and obligatory upon the alleged principal, must be shown to have been made by him with a full knowledge of all the material facts connected with the transaction to which it relates; and especially must it appear that the existence of the contract and its nature and consideration were made known to him." Mechem on Agency, § 129. "A ratification of the unauthorized acts of an attorney in fact, without a full knowledge of all the facts connected with those acts, is not binding on the principals. No doctrine is better settled on principle and authority, than this, that the ratification of the act of an agent previously unauthorized must, in order to bind the principal, be with a full knowledge of all the material facts. If the material facts be either suppressed or unknown, the ratification is invalid, because founded on mistake or fraud." Owings v. Hull, 9 Pet. (U. S.) 607, 9 L. Ed. 246.

Want of such knowledge prevents the possibility of ratification by silence, and it invalidates an express ratification, as will be clearly disclosed by an examination of the following decisions: Bosseau v. O'Brien, 4 Biss. 395, Fed. Cas. No. 1,667; Fuller v. Ellis, 39 Vt. 345, 94 Am. Dec. 327; Meyer, Weis & Co. v. Baldwin, 52 Miss. 263; Forrestier v. Bordman, 1 Story, 43, Fed. Cas. No. 4,945; Bank v. Bank, 13 Bush (Ky.) 526, 26 Am. Rep. 211; Craighead v. Peterson, 72 N. Y. 279, 28 Am. Rep. 150; Reese v. Medlock, 27 Tex. 120, 84 Am. Dec. 611; Bennecke v. Insurance Co., 105 U. S. 355, 26 L. Ed. 990; Lynch v. Smyth, 25 Colo. 103, 54 Pac. 634; Smith v. Kidd, 68 N. Y. 130, 23 Am. Rep. 157; Bell v. Cunningham, 3 Pet. (U. S.) 69, 7 L. Ed. 606; Ward v. Williams, 26 Ill. 447, 79 Am. Dec. 385; Navigation Co. v. Dandridge, 8 Gill & J. (Md.) 248, 29 Am. Dec. 543; Combs v. Scott, 12 Allen (Mass.) 495; Bank v. Jones, 18 Tex. 811; White v. Davidson, 8 Md. 169, 63 Am. Dec. 699; Bannon v. Warfield, 42 Md. 23; Bohart v. Oberne, 36 Kan. 284, 13 Pac. 388; Bryant v. Moore, 26 Me. 84, 45 Am. Dec. 96; McCants v. Bee, 1 McCord, Eq. (S. C.) 383, 16 Am. Dec. 610; Billings v. Morrow, 7 Cal. 171, 68 Am. Dec. 235.

From the review of the evidence herein given and conclusions stated respecting the same, it is plain that full knowledge of the material facts relating to the transaction between Murphy and Thompson is not shown to have been in the possession of the defendant corporation at any time before the institution of this action. Mr. Thompson does not testify to any statement, on his part, to the general manager or Mr. Getty, as to what the consideration of the note was. Nor

is there anything in the testimony of John F. Thompson or George B. Thompson, tending to show that they revealed to any director the circumstances which constituted the ground for executing the note. No notice was given of the satisfaction of the Blackwater Lumber Company account out of the note, or that the residue of it was represented by a check payable to the corporation. Nothing in the evidence shows that any record in the bank in which the corporation kept its deposits, or on the books of the corporation itself, discloses the receipt of the money, or its appropriation to the use of the defendant company. This failure to bring home to the defendant knowledge of the material facts, in connection with its silence, makes a fatal defect in the case, and, therefore, the court should have sustained the demurrer to the evidence.[48] * * *

As the demurrer to the evidence should have been sustained, and no error has been shown in the action of the court in excluding evidence offered, the judgment must be reversed, the demurrer sustained, and judgment rendered here for the defendant, with its costs in the court below, as well as costs in this court.

KELLEY v. NEWBURYPORT & A. H. R. CO.

(Supreme Judicial Court of Massachusetts, 1886. 141 Mass. 496, 6 N. E. 745.)

Action upon certain promissory notes. Upon a verdict for plaintiff, defendant alleged exceptions.

C. ALLEN, J. The first ground of defense is that by virtue of St. 1871, c. 381, § 6, the defendant was forbidden to build its road until a certificate had been filed in the office of the secretary of the commonwealth, signed and sworn to by the president, treasurer, clerk, and a majority of the directors, stating that the whole amount of the capital stock had been unconditionally subscribed for by responsible parties, and that 50 per cent. of the par value of each share of the same had been actually paid into its treasury in cash. It appeared by the auditor's report that such a certificate was filed in season, but he received evidence to show, and found as a fact, that 50 per cent. of the par value of each share had not been paid in, though the whole of the capital stock had been duly subscribed for, and more than 50 per cent. of the whole amount of it had been paid in at the time of the making of the contract for the construction of the road. Under these circumstances, the defendant contends that it had no power to enter into a

[48] See, also, Ladd v. Hildebrant, 27 Wis. 135, 9 Am. Rep. 445 (1870), holding that the principal must have knowledge, not only of every material fact relating to the act or contract alleged to have been ratified, but also of every fact requisite to enable him to repudiate it, or the means of knowledge must be at hand, so that he may obtain it, or it shall be his fault if he does not.

The principal may be bound where he had not full knowledge, if all the elements of estoppel are present. Thompson v. Mfg. Co., supra, p. 108; Pope v. Armsby Co., 111 Cal. 159, 43 Pac. 589 (1896).

contract for the construction of its road; that the act was ultra vires; that the unanimous action of the stockholders would not cure the taint; and that all promises to pay for work and materials in building the road, and all notes given therefor, are void and incapable of ratification, and that it cannot now be held responsible therefor, although for nearly 10 years it has held, enjoyed, operated, and taken the earnings of the road so built for it, and paid the interest on the notes.[40] In reference to this ground of defense, it is sufficient to say that, according to cases heretofore decided, it has been declared to be unavailable. It was not intended by the legislature to allow corporations to escape from their just debts in this manner. First Nat. Bank of Salem v. Almy, 117 Mass. 476; Augur Steel Axle Co. v. Whittier, 117 Mass. 451; Whitney v. Wyman, 101 U. S. 392, 25 L. Ed. 1050. See, also, Davis v. Old Colony R. R., 131 Mass. 260, 41 Am. Rep. 221; Monument Nat. Bank v. Globe Works, 101 Mass. 57, 3 Am. Rep. 322; Gold Min. Co. v. National Bank, 96 U. S. 640, 24 L. Ed. 648; National Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188; Harris v. Runnels, 12 How. 79, 13 L. Ed. 901; O'Hare v. Second Nat. Bank, 77 Pa. 96.

The defendant then contends that the notes in suit cannot be enforced because they were given to its own directors in payment for the construction of the road by them, and are now held by the plaintiff subject to all defenses which might have been made to a suit upon them by the payees. Upon this point the only question properly before us is whether there was sufficient evidence to warrant the jury in finding a ratification of the notes by the corporation. The presiding judge assumed that the notes were originally void, and submitted to the jury the single question of ratification. Being of the opinion that there was sufficient evidence to warrant the verdict on the question of ratification, we have no occasion to consider whether it might not also have been proper to submit to the jury the question of the original validity of the notes under proper instructions.

The first request for instructions was properly refused. It seems to refer to a supposed theory of the plaintiff that the notes might be ratified by the directors, whereas the sole question submitted to the jury was whether they had been ratified by the stockholders; i. e., by the corporation itself. The third request is open to the same objection.

The second request sought to incorporate into the doctrine of ratification a new element; namely, that, in order to make a valid ratification, the principal must have not only known all the facts, but also the legal effect of the facts, and then, with a knowledge both of the law and facts, have ratified the contracts by some independent and substantive act. This request also was properly refused. It is sufficient if a ratification is made with a full knowledge of all the material facts. Indeed, a rule somewhat less stringent than this may properly be laid

[40] See, also, Hyatt v. Clark, 118 N. Y. 563, 23 N. E. 891 (1890); Wilder v. Beede, 119 Cal. 646, 51 Pac. 1083 (1898); Contra: Brown v. Rouse, 104 Cal. 672, 38 Pac. 507 (1894).

down when one purposely shuts his eyes to means of information within his own possession and control, and ratifies an act deliberately, having all the knowledge in respect to it which he cares to have. Combs v. Scott, 12 Allen, 493, 497; Phosphate of Lime Co. v. Green, L. R. 7 C. P. 43, 57.

The fourth and fifth requests were both to the effect that on all the evidence the jury would not be warranted in finding a ratification. The circumstances of the case were such as to render the inference of ratification natural and easy, especially in view of the lapse of time since the notes were given. There was uncontradicted evidence tending to show that the directors made a contract with one Gowan for building the road for a certain price in money and stock, and that he gave to the company a bond, with Kelley and Binney as sureties, for the faithful performance of his contract. Gowan failing to perform his contract, the board of directors called on the sureties, who themselves were directors, to perform it, with notice that they would be held liable to the company for all damages that might accrue to the company by their default. Therefore the sureties proceeded to finish the road according to the contract, in which originally they had no interest. The price was fair and reasonable. The road, as completed by them, was a well-built road. The advancements made by them were in consequence of the notice given to them by the directors, and not with any fraudulent design to obtain any pecuniary benefit for themselves from said contract. The settlement was made with them by the directors under authority of a general vote of the stockholders authorizing them to make any settlement, and the notes in suit were given.

As a general rule, a contract between a corporation and its directors is not absolutely void, but voidable at the election of the corporation. Such a contract does not necessarily require any independent and substantive act of ratification, but it may become finally established as a valid contract by acquiescence. The right to avoid it may be waived. Union Pac. R. R. v. Credit Mobilier, 135 Mass. 376, 377; Twin Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328; Hotel Co. v. Wade, 97 U. S. 13, 24 L. Ed. 917; Ashhurst's Appeal, 60 Pa. 290. In the present case, such ratification or waiver might well be inferred; and, indeed, we do not see how any other inference could fairly be drawn from the acts of the company in holding and operating the road for so many years without taking any steps to repudiate the notes; from the payment of interest; from the acceptance of the report of the treasurer on October 6, 1875, and October 2, 1878; and from the acceptance of St. 1884, c. 149, authorizing the company to issue bonds to an amount not exceeding $30,000 for the purpose of extinguishing its floating debt. Exceptions overruled.

EHRMANTRAUT v. ROBINSON et al.

(Supreme Court of Minnesota, 1893. 52 Minn. 333, 54 N. W. 188.)

Appeal from an order, denying motion of defendants for a new trial.

MITCHELL, J. This action was brought on the covenants of a lease to recover rent for the last eight months of the term, viz. from September 1, 1890, to May 1, 1891. The evidence discloses the following facts: Nora Grove No. 23, U. A. O. D., of which the defendants were members, was an unincorporated association or society of individuals, formed for social and benevolent purposes, and not for gain or pecuniary profit. Among other officers, they had three trustees, of whom defendants Robinson & Larson were two. The scope and extent of the powers and duties of these trustees was to take charge of the property of the association. In May, 1886, Robinson & Larson, without authority, so far as appears, from their associates, procured from plaintiff the lease referred to, of the upper story of a certain building, for the term of five years, at an annual rent of $300, payable $25 monthly in advance. The lease runs to them as trustees of the association, and there is and can be no question but that in taking the lease these trustees assumed to act for and in behalf of the society. In July, 1886, the members of the association, including the defendants, entered into possession of the premises, and continued to hold their meetings there until some time in the fall of 1890, when the society disbanded. While the society occupied the premises, they paid rent therefor, $25 per month, up to September 1, 1890. The lease was never reported to or acted on by the society at any of its meetings, and it may also be assumed that neither Hervin nor Wilson ever knew what the terms of the lease were, and that Hervin, perhaps, did not even know that there was any written lease. But there is abundant evidence to show that both of them knew that some agreement had been made in behalf of the association, with plaintiff, for the use of the premises, and that without inquiring, or in any way attempting to inform themselves, as to what the terms of that agreement were, they, in common with their associates, went into possession and continued to use and occupy the premises for the purposes of their society until they disbanded.

It seems to us that neither of the counsel has fully grasped the legal principles applicable to this state of facts. Of course, a benevolent or social club or association of this kind is not a partnership, in any proper sense of that term. The members are liable, if liable at all, for the acts of their associates, on the ground of principal and agent, and not of partnership. Hence, it is undoubtedly true that only those members who authorized or subsequently ratified the act of these trustees in taking this lease would be bound by it. Bates, Partn. § 75; Lindl. Partn. 50, Story, Partn. § 144; Flemyng v. Hector, 2 Mees. & W.

172; Ash v. Guie, 97 Pa. 493, 39 Am. Rep. 818. But it is true that all the members who subsequently ratified the act are liable, and in our opinion the act of Hervin and Wilson amounted to a ratification.

It is sometimes said that, to constitute a ratification of an unauthorized act of an agent, the principal must have had knowledge of all the material facts. As to a past and completed transaction, this would be generally true, but there are many cases where the conduct of the principal may amount to a ratification, although he may not know all the facts as to the unauthorized act of the agent in his behalf. He may ratify by voluntarily assuming the risk without inquiry, or he may deliberately ratify upon such knowledge as he possesses, without caring for more. Lewis v. Read, 13 Mees. & W. 834, Kelley v. Railroad Co., 141 Mass. 496, 6 N. E. 745.

Where, as in the present case, the defendants Hervin & Wilson had notice that an unauthorized contract had been made in their behalf for the use of these premises, it was their duty, before accepting its benefits, to ascertain what the terms of that contract were. By going into possession, and enjoying the use of the premises, without any attempt to ascertain the terms of the lease under which they entered, they must be held to have deliberately intended to take the risk of ratifying upon such knowledge as they had.[50]

2. The statute of frauds, which defendants invoke, has no application to the case. Of course, to bind the plaintiff, the lessor, it was necessary that the lease should be in writing, and subscribed by him. But a lessee neither "creates, grants, nor declares" any estate or interest in lands. By accepting a lease, he is bound by all its covenants to be by him performed, and this acceptance need not be in writing. The authority of an agent to procure or accept it for him is not required to be in writing, and, as original authorization may be by parol, so may ratification. Order affirmed.

LEWIS v. READ.

(Exchequer of Pleas, H. V. 1845. 13 Mees. & W. 834.)

Case. The first count was for illegally distraining and selling the cattle of the plaintiff for rent due to the defendant Read from one John Lewis, without duly appraising the same; the second count was in trover: the third was for selling them for less than the best price.

[50] See, also, Walker v. Walker, 5 Heisk. 425 (1871), holding that ignorance of the facts, whether due to want of inquiry by the principal and neglect to ascertain the facts, or otherwise, will render the ratification ineffectual, and Stokes v. Mackay, 64 Hun, 639, 19 N. Y. Supp. 918 (1892), in which it was said that a principal may, if he chooses, adopt or ratify his agent's acts without full information, if his intent to do so be clearly manifest. If he has such confidence in his agent's judgment and fidelity that he is willing to abide any reasonable liability which the agent has honestly and in good faith assumed to impose on him, he may take the risk of the agent's act without inquiry, and adopt the whole act.

Plea, not guilty, by statute. At the trial, before Coleridge, J., at the last assizes for Montgomeryshire, it appeared that the plaintiff's brother, John Lewis, was tenant from year to year to the defendant Mr. Crewe Read, of a mill and farm called Aberborthen, and a mountain sheep-walk called Penybryn; and that, being in arrear with his rent, the other defendants, by the verbal direction of a Mr. Owens, who was Mr. Read's general agent for the management of his estate, on the 11th May, 1844, distrained about forty sheep belonging to the plaintiff to satisfy the rent, which were sold, under Mr. Owen's directions, for £14. 15s. Mr. Owens had expressly directed the defendants not to take any thing but what they should find on Aberborthen or on Penybryn.

The main questions in the cause were, first, whether the sheep (which were clearly shown to be the property of the plaintiff, and not of John Lewis) were or were not distrained upon the sheep-walk of Penybryn, or beyond its boundary; and, secondly, whether, at the time of the distress, John Lewis's tenancy in, or possession of the farm and sheep-walk continued: on both which points there was conflicting evidence. It appeared that the defendants had in the first instance seized upon a dozen sheep, which they found on the Penybryn mountain, and that, while they were driving them down, and somewhere very near the boundary of the Penybryn sheep-walk, these were joined by the other sheep, which had been straying upon an adjoining sheep-walk belonging to another farm. Mr. Owens received the proceeds of the sale of the sheep, and accounted for the money to Mr. Read; but there was no direct evidence that either Mr. Owens or Mr. Read was informed where the sheep were taken, or had any distinct knowledge that the distress was not made on the Penybryn sheep-walk. The learned Judge, in summing up, told the jury, that, if the sheep were distrained off the Penybryn sheep-walk, although it might be so near the boundary as to amount to a mere irregularity in the bailiffs; or if, at the time of the distress, the tenancy of John Lewis in Penybryn had determined, and he did not continue in possession of it, the defendants were all liable on the count in trover. The jury found, that the first lot of sheep were taken on Penybryn, but that there was no evidence to satisfy them where the others were taken; and that, at the time of the distress, John Lewis had ceased to be the tenant, and did not continue in possession of Penybryn; and thereupon, under the direction of the learned Judge, a verdict was entered for the plaintiff against all the defendants on the count in trover, damages £14. 15s.

Welsby, in Michaelmas Term last, obtained a rule nisi for a new trial, on the ground of misdirection; contending, that, without evidence of the ratification by the defendant Read of the irregularity in the execution of the distress, with knowledge of such irregularity, he could not be liable in trover; that there was no evidence of such rati-

fication, or, if there were, that the question had not been left to the jury.

W. Yardley and E. Beavan (with whom were Jervis and Wilkin) now showed cause: First, the sale of the sheep, the proceeds of which were received by the defendant Read, was a conversion for which he was clearly liable on the count in trover. [PARKE, B. But then you must show a *joint* conversion, and there was no evidence that the *other* defendants took part in the sale.] Secondly, the whole transaction, from the original seizure down to the sale of the sheep, may be regarded as one continued conversion, to different parts of which all the defendants were parties; the bailiffs by the actual seizure, and the defendant Read by directing, through his agent, the sale of the sheep, and receiving the proceeds of it. But, even supposing that the original seizure is to be regarded as the conversion complained of, there was sufficient evidence of a ratification by the defendant Read of the illegal act of the other defendants in making the seizure. It appeared that Mr. Owens was his general agent for the management of his estate; and the receipt by him, through such agent, of the proceeds of the illegal distress, without inquiring into the circumstances, was sufficient evidence against him that he adopted the acts of the bailiffs done on his behalf.

Welsby (with whom was Townsend), in support of the rule: The conversion complained of at the trial clearly was the original seizure of the sheep, and not the sale. The previous *authority* did not warrant the seizure off Penybryn; and there was no evidence of a *ratification* by the defendant Read of that illegal seizure. A party cannot be made a *wrongdoer* by his merely receiving the proceeds of a distress made for his benefit, unless he knew it to have been wrongfully made. At all events, the question of ratification ought to have been left to the jury. [He was then stopped by the Court.]

PARKE, B. I am afraid the rule must be absolute. There is no doubt that the acts of the defendant Read, in directing, through his agent Owens, the sale of the sheep, and receiving the proceeds, were a sufficient ratification of the act of the bailiffs in making the distress, as to such of the sheep as were taken on the Penybryn sheep-walk, because the taking of them was within the original authority given to the bailiffs by Owens as the agent of Read. But as to the others which were not proved to have been taken on Penybryn, and as to which, therefore, the authority was not followed, Mr. Read could not be liable in trover, unless he ratified the act of the bailiffs, with knowledge that they took the sheep elsewhere than on Penybryn; or unless he meant to take upon himself, without inquiry, the risk of any irregularity which they might have committed, and to adopt all their acts.[51]

[51] See, also, Tucker v. Jerris, 75 Me. 184 (1883), in which the ratification by a principal of a tort of the agent was involved. Said the court: "Of original authority even to commence a suit in the name or for the benefit of Jerris there was no evidence whatever—of ratification, none but the failure to

There appears to have been evidence quite sufficient to warrant the jury in coming to the conclusion, that he did, in this sense, ratify the acts of the other defendants; but, as this question was not left to the jury, the defendant is entitled to a new trial.

ALDERSON, ROLFE, and PLATT, BB., concurred.

Rule absolute.

THACHER v. PRAY.

(Supreme Judicial Court of Massachusetts, 1873. 113 Mass. 291, 18 Am. Rep. 480.)

Thacher sold one Gray potatoes and left with him a horse to keep, but not to sell. Gray owed Pray, and sold him the horse to satisfy the debt, receiving in addition a check for $100. This check he indorsed and mailed to Thacher, who cashed it, supposing it was in payment for the potatoes. When he learned that Pray had the horse he demanded its return, but refused to give up the proceeds of the check. The court below charged that the retention of the $100 after full information of the transaction, and the refusal to restore it to Pray, was an adoption of the whole transaction. Verdict for defendant, and plaintiff alleges exceptions.

ENDICOTT, J. The instructions upon which this case was given to the jury failed to notice an important portion of the evidence. If the only dealings between the plaintiff and Gray related to this horse, and the money paid for the horse by the defendant to Gray, who had no authority to sell, had been sent to the plaintiff, the taking and keeping it might be a ratification of the sale by Gray; or if the plaintiff had wished to rescind it, he should return the money so received. But the evidence in the case required other and further instructions. It appeared that the plaintiff had sent potatoes to Gray for sale, and there was evidence tending to show that the check for $100, taken by Gray

direct its discontinuance as soon as it came to his knowledge that it had been commenced in his name when Chase's attorney presented the bond for his approval. The question is whether that omission imposes upon the defendant a liability for Chase's tort, if he committed one. To bind one to the performance of a contract which another without authority has assumed to make for him, the ratification must be made with a full knowledge of all material facts. 'Ignorance or misapprehension of any of the essential circumstances relating to the particular transaction alleged to have been ratified will absolve the principal from all liability by reason of any supposed adoption of or assent to the previously unauthorized acts of an agent.' Combs v. Scott, 12 Allen, 493. And this is so even though the ignorance or misapprehension arises from the negligence and omission of the defendant to make any inquiry relative to the subject-matter. Ibid. To hold one responsible for a tort not committed by his orders, his adoption of and assent to the same must at all events be clear and explicit, and founded on a clear knowledge of the tort which has been committed. Adams v. Freeman, 9 Johns. 117; West v. Shockley, 4 Har. 287; Kreger v. Osborn, 7 Blackf. 74; Abbott v. Kimball, 19 Vt. 551 [47 Am. Dec. 708]."

on account of the wrongful sale of the horse, was paid over to the plaintiff, received by him, and credited on account of the potatoes, and the plaintiff did not know the horse had been sold, for a long time afterward. These facts justify the plaintiff's prayer for instructions, and we think they should have been given.

It does not affect the rights of the parties that the same check which defendant gave Gray was given to the plaintiff, if it was applied to the settlement of an existing account between them, without any notice that it was a part of the proceeds of the unauthorized sale of the horse. Being indorsed by Gray it was in the plaintiff's hands payable to bearer, transferable by delivery, and subject to the same rules as bank bills, coupons, or other instruments payable in money to bearer. Spooner v. Holmes, 102 Mass. 503, 3 Am. Rep. 491. It is as if Gray had cashed the check and sent the identical or other bills to the plaintiff. It was held in Lime Rock Bank v. Plimpton, 17 Pick. 159, 28 Am. Dec. 286, where an agent had lent the money of his principal to his private creditor, who appropriated it to the payment of the debt, that the principal could not recover it, the creditor not knowing at time of the loan that the money belonged to the principal. The creditor had the right to secure his private debt, and being money having no ear mark, it did not stand on the same ground as chattels. A party is not bound to inquire into the authority of a person from whom he receives money in payment of a debt, for a different doctrine would be productive of great mischief. In that case as in this, there was no privity between the parties, and the equities were much stronger than here.

Exceptions sustained.

(F) Ratification in Part

RUDASILL v. FALLS.

(Supreme Court of North Carolina, 1885. 92 N. C. 222.)

Plaintiff, defendant, and one Green became sureties on a note for $1,600, given by the firm of Jenkins, Homesley & Oates to A. V. Falls. Green and Jenkins became insolvent and Oates died. Homesley wished to keep the factory running to protect the sureties. Defendant got a bill of sale of $2,000 of property, which plaintiff claimed was in behalf of the sureties, and to protect them and enable Homesley to continue to run the factory. Defendant denied that he had ever come into possession of any property for such purpose, or that plaintiff had agreed to the arrangement. Action to recover from defendant the moiety, paid by plaintiff, on the allegation that the defendant received from their principals property sufficient in value to discharge the entire debt. The court instructed the jury to find for plaintiff if

they believed his testimony; for defendant if they believed his. Judgment for plaintiff, and defendant appeals.

SMITH, C. J.[52] * * * The instruction in this alternative form is unexceptionable as far as it goes. But there is an intermediate aspect of the case presented in the testimony, and perhaps warranted by it, which was not brought to the attention of the jury. The result does not necessarily depend upon the terms of the first arrangement, nor the extent of the authority conferred upon the defendant, as agent of his associate sureties.

Assuming the plaintiff's representation to be true and his memory of what occurred entirely accurate, his statement is not in accord with the understanding of Homesley, who made the proposal, and the latter may have refused to make the assignment at all, except upon the condition of a continuance of the factory operations. If then, the defendant could not effect the object of the agency under the prescribed limitations and exceeded them in what was done, the plaintiff had an election to ratify or repudiate what was done on behalf of all. This he was bound to do, and he could not sever parts of a single agreement embraced and expressed in the two writings, so as to take advantage of that which was favorable without the whole being assumed. The agency being exceeded, he was not bound by what the agent did in the name and for the common benefit, but he was bound to take the arrangement in its entirety or not to recognize its obligations at all.

"The principal cannot of his own mere authority ratify a transaction in part and repudiate as to the rest," is the language of Mr. Justice Story in section 250 of his work on Agency. "He must either adopt the whole or none."

Another recent author lays down the same doctrine thus: "A nullification must extend to the whole of a transaction." So well established is this principle, that if a party is treated as an agent in respect to one part of a transaction, the whole is thereby ratified. From this maxim results a rule of universal application that where a contract has been entered into by one man as agent of another, the person on whose behalf it has been made "cannot take the benefit of it without bearing its burdens. The contract must be performed in its integrity." Ewell's Evans' Agency, 70 (Ed. of 1879, p. 95).

The rule rests upon sound reason and abundant authority. Crawford v. Barkley, 18 Ala. 270; Hodnett v. Tatum, 9 Ga. 270; Bank v. Hanner, 14 Mich. 208; Coleman v. Stark, 1 Or. 115.

The record, and these instructions asked, present this view of the case, and the defendant had a right to have them, or their equivalent, given for the guidance of the jury. The judge was mistaken in his hurried reading of the series of instructions asked, in supposing they were embodied in his charge.

[52] Part of the opinion is omitted.

Had they been given the result might have been different, but at least the charge ought to have presented the case in this aspect to the consideration of the jury, and there is error in his mistake to do so. * * *

For error in the record a new trial was ordered.

MUNDORFF v. WICKERSHAM.

(Supreme Court of Pennsylvania, 1869. 63 Pa. 87, 3 Am. Rep. 531.)

Assumpsit upon a note which plaintiff delivered to the agent of defendant, and which it was alleged had been lent to defendant on a stipulation signed by the agent that the defendant would protect it at maturity. Plaintiff had to take up the note at maturity. From a nonsuit plaintiff brings error.

SHARSWOOD, J. If an agent obtains possession of the property of another, by making a stipulation or condition which he was not authorized to make, the principal must either return the property, or, if he receives it, it must be subject to the condition upon which it was parted with by the former owner. This proposition is founded upon a principle which pervades the law in all its branches: "Qui sentit commodum, sentire debet et onus." The books are full of striking illustrations of it, and more especially in cases growing out of the relation of principal and agent. Thus, where a party adopts a contract which was entered into without his authority, he must adopt it altogether. He cannot ratify that part which is beneficial to himself and reject the remainder: he must take the benefit to be derived from the transaction cum onere. Broom's Legal Maxims, 632; Hovil v. Pack, 7 East, 164; Coleman v. Stark, 1 Or. 115. In the familiar case of the sale of a horse by a servant, who, without authority, warrants the soundness of the animal, the master having received the price enhanced by the warranty, even though ignorant of it, is responsible. Nelyear v. Hawke, 5 Esp. 72; Alexander v. Gibson, 2 Campb. 555; Williamson v. Canaday, 25 N. C. 349. Where the agent of the insured, in effecting an insurance, makes a false and unauthorized representation, the policy is void. Where one of two innocent persons must suffer by the fraud or negligence of a third, whichever of the two has accredited him, ought to bear the loss. Fitzherbert v. Mather, 1 T. R. 12. The holder of a note is responsible for representations made by a broker employed to sell it, though contrary to his instructions. Lobdell v. Baker, 1 Metc. (Mass.) 193, 35 Am. Dec. 358. A principal who sues to enforce a contract, is bound by the representations made by his agent, in order to induce the opposite party to make it. Bennett v. Judson, 21 N. Y. 238; Elwell v. Chamberlain, 4 Bosw. 320; Id., 31 N. Y. 611. So a debtor cannot have the benefit of a compromise and release, effected by his agent, without adopting all the rep-

resentations made by the agent to the creditors, in negotiating it. Crans v. Hunter, 28 N. Y. 389. If an agent borrows money for his principal, and procures another to become surety, and the surety afterwards pays the debt, the principal is answerable to the surety. Higgins v. Dellinger, 22 Miss. 397. There is a very strong case in Barber v. Britton, 26 Vt. 112, 60 Am. Dec. 301, where the defendant sent a servant to employ the plaintiff, who was a physician, to visit a boy who had been injured in their service, and directed him to tell the plaintiff that they would pay for the first visit. The servant neglected to mention this, and employed the plaintiff generally. He attended the boy until he recovered, and the defendants were held liable for his whole bill. Many of these cases are put upon an implied authority, but the more reasonable ground, as it seems to me, is that the party, having enjoyed a benefit, must take it cum onere.

The defendant in this case received a note signed by the plaintiff, which was delivered to the defendant's agent, upon the faith of an undertaking that he would protect it at maturity. He has enjoyed the benefit of the transaction. He used the note in his business, and doubtless received the proceeds of its discount. The plaintiff has been obliged to pay it at maturity, as his possession of the note with the defendant's endorsements proves, at least prima facie. He is now seeking to enforce the contract evidenced by the receipt. Why shall not the defendant bear the burden of the transaction, as he has received the benefit? If the note was not an accommodation note, but founded on value; if the plaintiff did owe the defendant the amount of it, and the defendant was not bound to protect it at maturity, then there was a palpable fraud committed by the plaintiff, in requiring the agent to sign such a receipt, and this would be a full defence to the action.[53]

Judgment reversed, and procedendo awarded.

NATIONAL IMPROVEMENT & CONSTRUCTION CO. v. MAIKEN.

(Supreme Court of Iowa, 1897. 103 Iowa, 118, 72 N. W. 431.)

Suit in equity to recover the contract price for erecting a canning factory for defendants. The latter allege failure to fulfill the contract, and a compromise settlement with one Silvers, agent of plaintiff. Plaintiff denies the authority of Silvers to do more than receive payments. Appeal from judgment for defendant.

DEEMER, J.[54] * * * Now, it must be conceded that Silvers did not have authority to settle the dispute between these parties. He as-

[53] See, also, Dolvin v. Am. Harrow Co., 125 Ga. 699, 54 S. E. 706, 28 L. R. A. (N. S.) 785 (1906).

[54] Part of the opinion is omitted.

sumed to possess this power, however, and defendants paid him relying upon the truth of his claim. He received the money, delivered up the contract, conveyed the property to the defendants, delivered them his power of attorney, and took the money received in settlement with him to Chicago. When he arrived there, he reported his doings to his principal. As soon as they were advised as to what he had done, they attempted to repudiate and rescind his action, and the controlling question in the case is whether or not they did rescind.

The well-settled rule of law is that, when an agent transcends his power, his principal, upon being informed of the transaction, must repudiate or rescind the same within a reasonable time, or he will be held to have ratified the act. It is also elementary that a principal cannot ratify a part of the agent's unauthorized acts, and reject the remainder. The rule has thus been stated in the case of Bryant v. Moore, 26 Me. 84, 45 Am. Dec. 96: "There is no doubt that if one person knows that another has acted as his agent without authority, or has exceeded his authority as agent, and with such knowledge accepts money, property, or security, or avails himself of advantages derived from the act, he will be regarded as having ratified it. * * * If, for instance, a merchant should authorize a broker, by a written memorandum, to purchase certain goods at a price named, and the broker should exhibit it to the seller, and yet should exceed the price, and this should be made known to the merchant when he received the goods, if he should retain or sell them he would ratify the bargain made by the broker, and be obliged to pay the agreed price." And in the case of Benedict v. Smith, 10 Paige, 126, the court, in discussing a question ruled by the same principle as the one at bar, said: "* * * But where one person assumes to act as the agent of another, without authority, the person for whom he assumes to act cannot claim the benefit of his agency in part only, and reject it as to the residue of the transaction. And where the attorney of record goes beyond his general power in compromising or taking security for a debt intrusted to him for collection, if the client, upon being informed of the transaction, does not dissent without any unreasonable delay, the court may presume the attorney had a special power thus to act; especially where the client receives the benefit of the securities taken for him by the attorney."

Appellant recognized this rule of law, and, in giving the notice to which we have referred, attempted to repudiate the transaction; and the real question is whether or not it did so. It gave notice of the repudiation, and demanded the return of the property and of the papers delivered to the defendants, but the only return it made of the money was to deposit it to the order of the president of the canning company, in a building in Chicago, with notice that, if the property and papers were not returned and the money accepted, it would credit it upon defendants' account. Having received the money from the defendants at Moravia, it was the duty of plaintiff, in case it desired

to rescind, to offer the same back to them at that place. Defendants were not required to go to Chicago or to any other place to get it. It had come into the possession of plaintiff through the acts of its agent,—unauthorized though they may have been,—and it was its duty to tender the same back to the defendants at the place where received. Eadie v. Ashbaugh, 44 Iowa, 519; Pars. Cont. (6th Ed.) p. 679; Story, Ag. § 259; Miles v. Ogden, 54 Wis. 573, 12 N. W. 81; Strasser v. Conklin, 54 Wis. 102, 11 N. W. 254; Elwell v. Chamberlin, 31 N. Y. 611; Hatch v. Taylor, 10 N. H. 538; Bank v. Oberne, 121 Ill. 25, 7 N. E. 85.

As the plaintiff did not restore the money collected by Silvers on the faith of the settlement, but, on the contrary, accepted it, and undertook to apply it on the defendants' account, it cannot be heard to say that the acts of its agent were not authorized. Defendants were not compelled to act under the notice given them by the plaintiff until their money was returned, or offered to be returned, at Moravia, Iowa. An offer to deliver it to them at Chicago was not sufficient, unless, possibly, they or some of them authorized to receive it were present in Chicago when the tender was made. The case relied upon by appellant (Harper v. Insurance Co., 5 C. C. A. 505, 56 Fed. 281) clearly announces this doctrine. There are a few exceptions to these general and well-recognized rules. For instance, it is held that, when a party has fraudulently procured the execution of a contract, he is not entitled to an offer to restore what he has received as a condition precedent to rescission. Hendrickson v. Hendrickson, 51 Iowa, 68, 50 N. W. 287. Again, it has been held that if one, by fraudulent representations, procures a settlement and discharge of a cause of action, it is merely a receipt for a gratuity, and plaintiff may maintain his action without returning the money paid. O'Brien v. Railway Co., 89 Iowa, 644, 57 N. W. 425. These cases are based upon the doctrine that one who attempts to rescind a transaction on the ground of fraud is not required to restore that which he would be entitled to retain either by virtue of the contract sought to be set aside or of the original liability. See, also, Allerton v. Allerton, 50 N. Y. 670; Bebout v. Bodle, 38 Ohio St. 500. Another exception recognized by some of the authorities is to this effect: that "ratification does not arise when the principal accepts the results of an unauthorized act, not as a matter of choice, but merely for his own protection, to prevent further loss or liability therefrom." This exception is recognized in the following among other cases: Triggs v. Jones, 46 Minn. 277, 48 N. W. 1113; Mills v. Berla (Tex. Civ. App.) 23 S. W. 910; Nye v. Swan, 49 Minn. 431, 52 N. W. 39; Crooker v. Appleton, 25 Me. 131.

Without committing ourselves to this last-named exception, it is sufficient to say that there is no claim, either in the pleadings or in argument, that plaintiff was justified in withholding the money under any such rule. Its claim in this respect is that defendants knew of the agent's authority, and that they were guilty of fraud in making

the settlement, and that the case comes under the first exception named, which we have recognized as being the law. True it is that defendants knew of the terms of the agent's power of attorney, but it is also true that they believed from his representations, and from the construction they placed upon the instrument, that he had full power to settle the dispute and compromise the claim. There is no evidence that, in effecting the settlement, they intended to defraud the plaintiff. On the contrary, they acted in the utmost good faith. They did not intend to pay plaintiff any money except in settlement of the claim; nor can their payment be said to be a mere gratuity, as in the O'Brien Case. The case of Stainer v. Tysen, 3 Hill, 280, relied upon by appellant, is not in point. But, aside from all this, the question here is not one of repudiation of contract or settlement because of fraud, but rather as to an agent's power to make a settlement, and the exception has no application. If, with the authority of the agent conceded, there was a question as to the character of the settlement, there might be room for application of the doctrine announced in the Hendrickson Case.

The ultimate question here is the authority of the agent. He was not, as we have seen, expressly authorized to make the settlement. He, however, assumed to do so, and his principal accepted the benefits thereof with full knowledge of what had been done. Having ratified the acts of its agent, the transaction was the same in law as if expressly authorized.[55] If authorized, there was no fraud, and consequently the plaintiff was not justified in retaining the money while at the same time asserting that its agent was guilty of fraud. It cannot take the benefits of its agent's contract, and at the same time repudiate its burdens. The case of Hakes v. Myrick, 69 Iowa, 189, 28 N. W. 575, recognizes this distinction, although it is not made as prominent as it might have been. As the account was fully settled by plaintiff's agent, it is not entitled to recover. Affirmed.

[55] When a transaction contains several independent and severable things, some within and some beyond the agent's authority, the principal may adopt the former and repudiate the latter; but not when the transaction is an entirety. Nye v. Swan, 49 Minn. 431, 52 N. W. 39 (1892); Miller v. Board of Education of City of Sacramento, 44 Cal. 166 (1872). When the third person knows the agent's want of authority, he cannot set up a ratification of the unauthorized part from acceptance of that which was authorized. Bryant v. Moore, 26 Me. 84, 45 Am. Dec. 96 (1846); Watson v. Bigelow, 47 Mo. 413 (1871). Compare Henderson v. Railway Co., 17 Tex. 560, 576, 67 Am. Dec. 675 (1856).

Neither can the ratification of one act be established from a previous ratification of another similar, but distinct, act. Forsyth v. Day, 41 Me. 382 (1856), ante, p. 76.

So also ratification by a railway company of a promise by an agent to pay plaintiff a sum of money does not ratify an additional promise by the agent to give defendant employment for life, of which promise the company had no knowledge, even though the company made the payment and furnished the employment for a time. Bohanan v. B. & M. R. Co., 70 N. H. 526, 49 Atl. 103 (1900). To the same effect is St. John & Marsh Co. v. Cornwell, 52 Kan. 712, 35 Pac. 785 (1894); Roberts v. Francis, 123 Wis. 78, 100 N. W. 1076 (1904).

(G) New Consideration

GRANT v. BEARD.

(Supreme Judicial Court of New Hampshire, 1870. 50 N. H. 129.)

Assumpsit to recover for repairs on two wagons. Plaintiff alleged that defendants' father, who brought the wagons to be repaired, was their agent and could and did bind them to pay for the repairs. Whether the father was their agent, whether they owned the wagons or received any benefit from the repairs, and whether they subsequently assented to and ratified the contract, were the questions in dispute, on which the evidence was conflicting.

FOSTER, J. The ratification, upon full knowledge of all the circumstances of the case, of an act done by one who assumes to be an agent, is equivalent to a prior authority. By such ratification the party will be bound as fully, to all intents and purposes, as if he had originally given express authority or direction concerning the act.

A parol contract may be ratified by an express parol recognition of the act, or by conduct implying acquiescence, or by silence when the party, in good faith, ought to speak. And so the principal may be estopped to deny the agent's original authority. Story on Agency, § 239; Metcalf on Contracts, 112; Hatch v. Taylor, 10 N. H. 538; Despatch Line v. Bellamy Mfg. Co., 12 N. H. 232, 37 Am. Dec. 203; Davis v. School District, 44 N. H. 399; Warren v. Wentworth, 45 N. H. 564; Forsyth v. Day, 46 Me. 194; Ohio & Mississippi R. Co. v. Middleton, 20 Ill. 629.

Such ratification relates back to and incorporates the original contract or transactions, so that, as between the parties, their rights and interests are to be considered as arising at the time of the original act, and not merely from the date of the ratification; and a suit to enforce the obligation assumed by the party who ratifies is, to all intents and purposes, a suit founded upon the original act or contract, and not on the act of ratification. Davis v. School District, before cited; Low v. Railroad, 46 N. H. 284; Doggett v. Emerson, 3 Story, 737, Fed. Cas. No. 3,960; Mason v. Crosby, 1 Woodb. & M. 342, Fed. Cas. No. 9,234; Clark's Executors v. Van Riemsdyk, 9 Cranch, 153, 3 L. Ed. 688; Culver v. Ashley, 19 Pick. 301; Forsyth v. Day, before cited.

Therefore the original consideration applies to the ratification, thus made equivalent to an original contract, and supports the implied promise upon which the present action is founded.

The ratification operates directly, and not merely as presumptive evidence that the act was originally done by the authority of the defendants; and therefore it is unnecessary to consider whether or not the evidence tends to show an original authority. The subsequent assent is, per se, a confirmation of the agent's act; and there is no

valid distinction between a ratification of the agent's act, and a direct and original promise to pay for the services rendered by the plaintiff. Wherever there would have been a consideration for the original engagement if no agent or party assuming to act as agent had intervened, such original consideration is sufficient to sustain the act of ratification.

In none of the cases cited is the subject of a new consideration, to support the ratification, alluded to as necessary; but the logical deduction from the principle that the ratification relates back to and covers the original agreement, is wholly inconsistent with such a proposition; and the contrary doctrine is expressly held in numerous cases. Commercial Bank of Buffalo v. Warren, 15 N. Y. 583, and cases cited.

There was abundant evidence, in the present case, from which the jury might have found that the defendants owned the wagons and received a positive benefit from the repairs; but such evidence and such finding were wholly unnecessary, because it is not material that the party making the promise should receive a benefit from the other party's act; it is sufficient if any trouble, prejudice, expense, or inconvenience accrued to the party to whom the promise is made. Metcalf on Contracts, 163; 1 Parsons on Contract, 431.

We are therefore of the opinion that the instruction of the court to the jury "that if they found that the defendants did not authorize their father to make the contract as their agent, but afterwards assented to what he had done, their assent would not make them liable unless they owned the wagons at the time they were repaired, or received some benefit from the repairs," was erroneous; and for this reason the verdict must be set aside, and a new trial granted.[56]

(H) Necessity of Intent

BROWN v. HENRY.

(Supreme Judicial Court of Massachusetts, 1899. 172 Mass. 559, 52 N. E. 1073.)

Action on contract to recover damages for refusal to deliver about 25,000 pounds of coal, alleged to have been sold to plaintiffs by a broker. The latter gave a "bought note," which defendants rejected. Defendants except to verdict for plaintiffs.

KNOWLTON, J. It appeared upon the undisputed evidence that the broker inserted in the written memorandum of sale certain provisions which were not expressly authorized by the defendants. The jury found that there was no custom under which he could bind the defendants by these agreements. He was not the defendants' general agent, and the terms of his authority to make a sale could be inquired

[56] See, also, First National Bank of Trenton v. Gay, 63 Mo. 33, 21 Am. Rep. 430 (1876), ante, p. 95.

into. He could bind the defendants only by such contract as they authorized him to make. Coddington v. Goddard, 16 Gray, 436; Remick v. Sandford, 118 Mass. 102.

Under the instructions of the court, and the finding above stated, the verdict for the plaintiffs must rest on a finding that the defendants ratified the broker's contract. The jury were allowed to find ratification on the ground that the plaintiffs were right, and the defendants wrong, in regard to the defendants' contention that the broker was not authorized to sell the wool at the price named in the contract; it appearing that the defendants stated, as their reason for repudiating the contract, that the broker had no authority to sell the wool at that price, and failed to make any objection to the provisions of the contract about credit, and the allowance of interest, unexpired storage, and fire insurance. These latter provisions were inserted in the contract by the agent without authority. There was no evidence that the situation of the plaintiffs was changed, or that their rights were in any way affected by reason of the form of the defendants' objection and disavowal.

Where something is to be done by one of two parties as a condition precedent to his exercise of a right against the other, the other may waive the performance, either wholly or in part. If there is an attempt at performance, which falls short of the requirement, and if objection is made by the party for whom it is done, with a statement of the grounds of his objection, the objector often is held to have waived his right afterwards to object, on other grounds, when the other has gone forward, relying upon the implied representation that the performance is satisfactory in other particulars. Clark v. Insurance Co., 6 Cush. 342, 53 Am. Dec. 44; Searle v. Insurance Co., 152 Mass. 263, 25 N. E. 290; Curtis v. Aspinwall, 114 Mass. 187, 19 Am. Rep. 332; Insurance Co. v. Norton, 96 U. S. 234, 24 L. Ed. 689; Titus v. Insurance Co., 81 N. Y. 410. These cases rest upon the ground that, when one is stating objections, a failure to disclose a ground of objection, in a particular which easily could be remedied, tends to mislead the other party to his detriment, and is so contrary to justice and good morals as to work an estoppel against doing it afterwards.

No such principle is applicable to the present case. We have an unauthorized contract made by an agent. The plaintiffs had no rights under it immediately after it was made. They have no rights under it now, unless the defendants ratified it. "Ratification of a past and completed transaction, into which an agent has entered without authority, is a purely voluntary act on the part of the principal. No legal obligation rests upon him to sanction or adopt it." Combs v. Scott, 12 Allen, 493; Bank v. Crafts, 2 Allen, 269. If, however, one is acting in the execution of a general power, but in a mode not sanctioned by its terms, and if any benefit comes to the principal from the act, ratification may be implied pretty quickly from lapse of time with knowledge of the circumstances. Foster v. Rockwell, 104 Mass. 167.

The evidence is undisputed that, within a reasonable time after being informed of the contract, the defendants in the present case repudiated it. The naked question is presented whether, if a principal, on learning of an unauthorized contract of an agent, repudiates it, giving a reason for so doing which proves to be without foundation, such repudiation is equivalent to an adoption of it. In the absence of anything beyond this to work an estoppel, we are of opinion that it is not. Ordinarily, ratification of an agent's act is a mere matter of intention.[57] In the present case, the defendants, as soon as the facts were ascertained, manifested in the clearest manner their intention not to ratify, and their subsequent conduct has all been consistent with their original repudiation of the attempted sale. They could not repudiate it in part, and adopt it in part. 1 Am. & Eng. Enc. Law (2d Ed.) 1192, and cases cited.

There is a class of cases in which the principal receives a direct benefit from an act of an agent, and it is held that, if he retains this benefit for a considerable time after he obtains full knowledge of the transaction, he thereby ratifies the act. Brigham v. Peters, 1 Gray, 139; Sartwell v. Frost, 122 Mass. 184; Coolidge v. Smith, 129 Mass. 554. Here, too, there is an element of estoppel which does not exist in the case at bar. One cannot have the benefit of an unauthorized act of an agent without confirming it. Ordinarily, a principal is not called upon to give reasons for declining to be bound by an act undertaken without authority. The controlling reason is that it was unauthorized. The particulars in which it lacks authority, usually, are of no importance. If the other party relies upon it, he has the burden of showing ratification. If the principal insists that it is unauthorized, and does nothing and says nothing which warrants the other party in treating it as ratified, the mere fact that he is incorrect in his statement of the particulars of the want of authority does not change his repudiation of the act into an adoption of it.

We are of opinion that the instructions in regard to ratification were erroneous, and that the jury should have been instructed that there was no evidence that the defendants ratified the contract declared on. See Price v. Moore, 158 Mass. 524, 33 N. E. 927. Exceptions sustained.

[57] In Smith v. Fletcher, 75 Minn. 189, 77 N. W. 800 (1899), it was said by Mitchell, J.: "Ratification, like authorization, is generally the creature of intent; but that intent may often be presumed by the law from the conduct of the party, and that presumption may be conclusive, even against the actual intention of the party, where his conduct has been such that it would be inequitable to others to permit him to assert that he had not ratified the unauthorized act of his agent."

IV. MANNER OF RATIFICATION

(A) In General

ZOTTMAN v. CITY AND COUNTY OF SAN FRANCISCO.

(Supreme Court of California, 1862. 20 Cal. 96, 81 Am. Dec. 96.)

Action to recover for extra services performed by plaintiff in making improvements on a certain square in San Francisco. A contract was made by the common council, but afterwards the special committee and superintendent appointed by the council concluded that a stone base for an iron fence should be substituted for the wooden one, contracted for, and that the fence should be painted. Accordingly in the presence of the other city officers they ordered the contractor to perform this extra work, and assured him the city would pay. During the progress of the work all the members of the common council were aware of the order and of the extra work done, but the bill was never paid. The city charter provided for action by the council by aye and nay vote, with publication in a city paper. "All contracts for work" were to be let to the lowest bidder after public notice. From judgment for defendant, plaintiff appeals.

FIELD, C. J.[58] [after stating the facts:] * * * A contract made in disregard of these stringent but wise provisions cannot be the ground of any claim against the city. Individual members of the common council were not invested by the charter with any power to improve the city property, and any directions given or contracts made by them upon the subject, had the same and no greater validity than like directions given and like contracts made by any other residents of the city assuming to act for the corporation. And if individual members could not thus make any valid contract originally, they could not by any subsequent approval or conduct impart validity to such contract. But we go further than this; the common council even could not by any subsequent action give validity to a contract thus made. The mode in which alone they could bind the corporation by a contract for the improvement of city property was prescribed by the charter, and no validity could be given by them to a contract made in any other manner. The rule is general and applies to the corporate authorities of all municipal bodies; where the mode in which their power on any given subject can be exercised is prescribed by their charter, the mode must be followed. The mode in such cases constitutes the measure of the power. Thus, where authority is conferred to sell property, with a clause that the sale shall be made at public auction, the mode prescribed is essential to the validity of the sale;

[58] Part of the opinion is omitted.

indeed there is no power to sell in any other way. Aside from the mode designated there is a want of all power on the subject. This is too obvious to require argument, and so are all the adjudications. Thus in Head v. Providence Insurance Company, 2 Cranch, 156, 2 L. Ed. 229, Mr. Chief Justice Marshall, in speaking of bodies which have only a legal existence, says: "The act of incorporation is to them an enabling act; it gives them all the power they possess; it enables them to contract, and when it prescribes to them a mode of contracting, they must observe the mode, or the instrument no more creates a contract than if the body had never been incorporated." See McCracken v. City of San Francisco, 16 Cal. 619; Farmers' Loan & Trust Co. v. Carroll, 5 Barb. 649; New York Fire Insurance Co. v. Ely, 5 Conn. 568, 13 Am. Dec. 100.

As a necessary consequence flowing from these views, a contract not made in the prescribed mode, cannot be affirmed and ratified in disregard of that mode by any subsequent action of the corporate authorities, and a liability be thereby fastened upon the corporation. Ratification is equivalent to a previous authority; it operates upon the contract in the same manner as though the authority to make the contract had existed originally. The power to ratify, therefore, necessarily supposes the power to make the contract in the first instance; and a power to ratify in a given mode supposes the power to contract in the same way. Therefore, where the charter of a city authorizes a sale of city property only at public auction, a sale not thus made is from its very nature incapable of ratification, because it could not have been otherwise made originally. So where the charter authorizes a contract for work to be given only to the lowest bidder, after notice of the contemplated work in the public journals, a contract made in any other way—that is, given to any other person than such lowest bidder—cannot be subsequently affirmed. Were this not so, the corporate authorities would be able to do retroactively what they are prohibited from doing originally.

We had occasion, in the case of McCracken v. City of San Francisco, to give to this subject great consideration, and we there held, that where authority to do a particular act can only be exercised in a particular form or mode, the ratification must follow such form or mode, and that a ratification can only be made when the principal possesses at the time the power to do the act ratified. The doctrines there laid down we regard of vital importance for the protection of the interests of municipal corporations, and without an adherence to them, restrictions such as were embodied in the charter of San Francisco—or at present are embodied in the consolidation act—upon the corporate authorities, may be practically disregarded and defeated. Since that decision was rendered, we have had our attention called to the case of Brady v. Mayor, etc., of New York, 16 How. Prac. 432, where these doctrines are affirmed in an opinion of great force, and applied to an alleged contract for work done upon a street in the city of New

York. The alleged contract in that case was made by the street commissioner on behalf of the city, and was for the performance of work upon the street in accordance with certain specifications, the stipulated price to be paid upon the confirmation of an assessment for the work by the common council. The work was performed in accordance with the provisions of the contract, and seventy per cent of the contract price was paid, and an assessment for the entire price was made for the work and confirmed. The amendment of 1853 to the charter of that city requires that "all work to be done and all supplies to be furnished for the corporation, involving an expenditure of more than $250, shall be by contract founded on sealed bids or on proposals made in compliance with public notice for the full period of ten days; and all such contracts, when given, shall be given to the lowest bidder with adequate security." In consequence of the manner in which the bids, made upon the proposals for the work, were tested, the lowest bidder could not be ascertained; it was therefore held that the contract was illegal and void. The question was then raised whether, under the circumstances, the defendants were liable for the work done. And this question was discussed by the court in two aspects—whether they were liable to the plaintiff as upon a quantum meruit, because the work had been performed and accepted; and whether the common council had the power to waive the original defect in the plaintiff's claim, and by their action affirm his title to recover, so as to give him a right of action, notwithstanding the requirements of the charter had not been complied with.

It is under similar aspects that the question of the liability of the city of San Francisco presents itself in the present case. "The corporation," said the court, "can only act through its chosen officers and agents. If they not only may pay for work and labor actually done without a compliance with the statute requisites, but are legally bound to such payment, then no contract is necessary, and the restrictions in the statute are a dead letter. If they may dispense with a contract, then and then only can they confirm an illegal and void contract, and then also by any acceptance of the work and a confirmation of the contract by resolution, they repeal the statute pro hac vice. The relation which the corporation and its officers bear to the subject, the duties they owe to the public and those upon whom the burden is to fall, and the nature of the powers they possess, forbid us to concede any such force to their acts. By the charter the power is limited and it is a familiar rule that corporations can only bind themselves by contracts they are expressly or impliedly authorized to make. It may sometimes seem a hardship upon a contractor that all compensation for work done, etc., should be denied him; but it should be remembered that he, no less than the officers of the corporation, when he deals in a matter expressly provided for in the charter, is bound to see to it that the charter is complied with. If he neglect this, or choose to take the hazard, he is a mere volunteer, and suffers only what he ought

to have anticipated. If the statute forbids the contract which he has made, he knows it, or ought to know it, before he places his money or services at hazard. The analogy drawn from the obligation of an individual to pay for work which he accepts, although there has been no previous contract for its performance, wholly fails to reach the present case. Here, neither the officers of the corporation nor the corporation, by any of the agencies through which they act, have any power to create the obligation to pay for the work, except in the mode which is expressly prescribed in the charter; and the law never implies an obligation to do that which it forbids the party to agree to do. And for the like reason the defendants cannot be treated as ratifying the unauthorized acts of its agents. The difficulty lies not merely in the want of original power in the agents to make the contract, but in the want of power in the corporation itself to make the contract otherwise than in the mode prescribed by the charter. An individual having power to make a contract may ratify or affirm it, when made by one who without authority assumes to be his agent, but if the individual have himself no such power, he can no more bind himself retroactively to its performance by affirmance or ratification than he could have done so prospectively in the first instance. The power to ratify ex vi termini implies a power to have made the contract, and the power to ratify in a particular mode implies the power to have made the contract in that manner." * * *[59]

Judgment affirmed.

(B) Written Ratification

JUDD v. ARNOLD.

(Supreme Court of Minnesota, 1884. 31 Minn. 430, 18 N. W. 151.)

Appeal by defendants from a judgment for restitution in an action for unlawful detainer.

GILFILLAN, C. J.[60] Action under chapter 84, Gen. St. 1878, to recover rented premises detained after the expiration of the term. It appears that plaintiff rented the premises to defendant Arnold for one year, terminating April 30, 1883; and February 5, 1883, he, assuming to act as plaintiff's agent, executed in her name to defendants Tibbitts and Myers a written lease of the premises; the term as to part of them to commence May 1, 1883, and to continue as to all till one year from the last date. Arnold had no authority in writing to rent the premises. The lease stipulated for a gross monthly rental for the rooms. It was therefore an entire and not a severable lease, and for a term exceeding one year. By the terms of the statute it was required to be in writing, and, being executed by an agent, his au-

[59] The opinion of Cope, J., is omitted.

[60] Part of the opinion is omitted.

thority to execute it was required to be in writing. "No estate or interest in lands, other than leases for a term not exceeding one year, * * * shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the parties creating, granting, assigning, surrendering, or declaring the same, or by their lawful agent thereunto authorized, *by writing.*" Section 10, c. 41, Gen. St. 1878. Our statute of frauds is peculiar, among other things, in this: that while, by section 10, authority in an agent to execute an instrument creating or conveying the estate must be in writing, by section 12 his authority to make an executory contract to create or convey it need not be in writing. Minor v. Willoughby, 3 Minn. 225 (Gil. 154).

A ratification by the principal of the not properly authorized act of the agent must be by an act of the character required for original authority.[61] Where that must be in writing, the ratification must also be in writing. Browne, St. Frauds, § 17; Fitch, Real Est. Ag. 57; McDowell v. Simpson, 3 Watts, 129, 27 Am. Dec. 338; Lawrence v. Taylor, 5 Hill, 113; Ingraham v. Edwards, 64 Ill. 526; Holland v. Hoyt, 14 Mich. 238. To permit an oral ratification would, in many cases, let in the very evils which the statute aims to exclude. The evidence of oral ratification by plaintiff of the lease executed by Arnold was therefore of no effect. Of course, a principal may, by his acts or declarations, lay the basis for an estoppel as to the *due* authority of the assumed agent. But, in a case like this, to make the assent and acquiescence of the principal, and acts of the lessees in reliance thereon, operate as an estoppel as to the authority of the assumed agent to execute the lease, it is essential that she should have known what sort of lease the agent had assumed to execute in her name. The lessees must be supposed to have known the law—that written authority in the agent was required to execute such a lease. And before they could rightfully rely and act on her assent to and acquiescence in a lease as evidence that she had authorized it in writing, they should have been sure that she was informed of the character of lease the agent had assumed to execute. The only evidence as to her information on the point was that defendant Arnold testified he told her he had agreed to rent the rooms to the other defendants for a year from May 1, 1883, and defendant Tibbitts testified he told her he and Myers had a lease for one year, to commence May 1, 1883. This was not such a lease as was in fact executed. The information thus given was not sufficient as a basis for an estoppel as to the lease in question. * * *

Judgment affirmed.

[61] See, also, Johnson v. Fecht, 185 Mo. 335, 345, 83 S. W. 1077 (1904), citing Hawkins v. McGroarty, 110 Mo. 546, 19 S. W. 830 (1892), and Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 230–232, 37 Am. Dec. 203 (1841), a leading case. The effect of a statute prescribing the mode of ratification is discussed in Morris v. Ewing, 8 N. D. 99, 76 N. W. 1047 (1898).

(C) Ratification under Seal

HEATH v. NUTTER.

(Supreme Judicial Court of Maine, 1862. 50 Me. 378.)

Writ of entry. Both parties claim under Charles D. Robbins, Heath under his quitclaim deed, dated February 17, 1858, Nutter under deed of Robbins, by Rich, his attorney, dated May 3, 1854. Nutter offered to prove by Robbins that Rich was his agent under power of attorney, given him to enable him to make the deed; that Robbins told Heath he had nothing to quitclaim, but was induced by Heath to believe there would be no impropriety in giving said quitclaim deed; that he had by letter and verbally ratified the act of Rich. The judge ruled that the power of attorney was not sufficient to authorize the deed by Rich, and excluded the evidence offered.

APPLETON, C. J. The power of attorney to Rich did not empower him to convey the demanded premises to the inhabitants of Tremont. The authority "to grant any and all *discharges* by deed or otherwise, both personal and real," as fully as the principal might do, cannot be fairly construed as enabling the agent to convey by bill of sale, or by deed of warranty, all the personal and real estate of his principal. Nor can the authority to convey by deed be found elsewhere.

Whenever any act of agency is required to be done in the name of the principal under seal, the authority to do the act must be conferred by an instrument under seal. A power to convey lands must possess the same requisites and observe the same solemnities as are necessary in a deed directly conveying the land. Gage v. Gage, 30 N. H. 424; Story on Agency, §§ 49, 50; Montgomery v. Dorion, 6 N. H. 250. So the ratification of an unauthorized conveyance by deed must be by an instrument under seal. Story on Agency, § 252. A parol ratification is not sufficient. Stetson v. Patten, 2 Greenl. 359, 11 Am. Dec. 111; Paine v. Tucker, 21 Me. 138, 38 Am. Dec. 255; Hanford v. McNair, 9 Wend. 54; Despatch Line Co. v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

The plaintiff received his conveyance with a full knowledge of the equitable rights of the tenants. The remedial processes of a court of equity may perhaps afford protection to the defendants. At common law their defence fails.

Defendants defaulted.

BLESS v. JENKINS.

(Supreme Court of Missouri, 1895. 129 Mo. 647, 31 S. W. 938.)

Action for $2,700 and interest for rent. The lease was in writing and under seal, signed by defendants in person and by plaintiffs by agent. Defendants paid the rent for six months, but gave timely notice in writing that because the lease was not signed by plaintiffs, nor by their agents duly authorized in writing, they would end their tenancy September 30. Nine months before the expiration of that time they moved out and sent the keys to plaintiffs, who refused to accept them and each month demanded the rent. Upon the defendants' refusal to pay, this suit was brought.

SHERWOOD, J.[62] [After holding that performance by plaintiffs took the lease out of the statute of frauds:] * * * (d) But, in addition to the foregoing reasons, others readily occur why the defense of the statute of frauds must prove unavailing. That statute does not require that a lease, or, indeed, any instrument, should be under seal. Admit, then, that plaintiffs' agents had no authority to bind them by a sealed instrument, still the unauthorized and unnecessary seal may be treated as superfluous and disregarded, and the sealed instrument deemed an unsealed one, and may be ratified as a simple contract in writing. Mechem, Ag. §§ 95, 141, and cases cited. And that a simple contract in writing made without authority is susceptible of oral ratification, no one questions.

In illustration of this point is the early case of Maclean v. Dunn, 4 Bing. 722, where Lord Chief Justice Best said: "It has been argued that the subsequent adoption of the contract by Dunn will not take this case out of the operation of the statute of frauds, and it has been insisted that the agent should have his authority at the time the contract is entered into. If such had been the intention of the legislature, it would have been expressed more clearly. But the statute only requires some note or memorandum in writing to be signed by the party to be charged, or his agent thereunto lawfully authorized, leaving us to the rules of common law as to the mode in which the agent is to receive his authority. Now, in all other cases a subsequent sanction is considered the same thing in effect as assent at the time,—'omnis ratihabitio retrotrahitur, et mandato aequiparatur'; and, in my opinion, the subsequent sanction of a contract, signed by an agent, takes it out of the operation of the statute more satisfactorily than an authority given beforehand. Where the authority is given beforehand, the party must trust to his agent. If it be given subsequently to the contract, the party knows that all has been done according to his wishes."

[62] Part of the opinion is omitted.

(e) There are authorities, also, which hold that one partner may ratify by parol an act under seal done by his copartner. Gwinn v. Rooker, 24 Mo. 290; 3 Kent, Comm. (13th Ed.) 49; Story, Partn. § 117.

(f) The doctrine has in some instances been extended beyond the limit here mentioned, so as to embrace cases where one person not sustaining the relation of partner to another may execute an instrument under seal, and the same may be ratified by matter in pais with like effect as were they partners. This is the rule announced in Massachusetts. Holbrook v. Chamberlin, 116 Mass. 155, 17 Am. Rep. 146, and cases cited.[68]

(g) In Worrall v. Munn, 5 N. Y. 229, 55 Am. Dec. 330, after an elaborate review of the authorities, it is there said: "These authorities show that there is no distinction between partners and other persons in the application of the modern rule that wherever an instrument would be effectual without a seal it would be valid and binding on the principal, although executed under seal by an agent without authority by deed, if authorized by a previous parol authority, or subsequently ratified or adopted by parol." 5 N. Y. loc. cit. 243, 5 Am. Dec. 330, and cases cited. See, also, Hunter v. Parker, 7 Mees. & W. 322; State v. Spartanburg & U. R. Co., 8 S. C. 129; Hammond v. Hannin, 21 Mich. 374, 4 Am. Rep. 490; Adams v. Power, 52 Miss. 828; State v. Shaw, 28 Iowa, 67.

As the result of these authorities, it should be held that the act of plaintiffs in putting defendants into possession of the premises, which they did on April 1, 1891, and the acceptance by them of rent for several months thereafter from defendants in conformity to the written lease, was an ample ratification of that instrument.

(h) Besides, the old lease having expired by its own terms on April 1, 1891, defendants were put into possession under and by virtue of the new lease, and enjoyed all the advantages they could have received had the new lease been formally valid in every particular. It does not lie in their mouths to denounce as invalid a lease under and by virtue of which those advantages were obtained. Holbrook v. Chamberlin, 116 Mass. loc. cit. 161; State v. Shaw, 28 Iowa, loc. cit. 75. * * *

Judgment for plaintiff affirmed.

[68] See, also, Adams v. Power, 52 Miss. 828 (1876), and Holbrook v. Chamberlin, 116 Mass. 155, 17 Am. Rep. 146 (1874), in which the court held it to be the settled doctrine in Massachusetts that the unauthorized execution of a deed by an agent may be ratified by parol. Compare Reese v. Medlock, 27 Tex. 120, 84 Am. Dec. 611 (1863).

(D) Implied Ratification

(a) In General

RALPHS v. HENSLER.

(Supreme Court of California, 1893. 97 Cal. 296, 32 Pac. 243.)

Action to foreclose a mortgage on defendant's property, given to secure three promissory notes, executed for defendant by her attorney in fact, James P. McCarthy, to plaintiff's testator, Kimball Hardy. Defendant denied that McCarthy's power of attorney authorized him to make the notes or mortgage, and for a further defense set up that he had, as her agent, paid the interest and secured an extension of the notes. To show this a writing purporting to be signed by Hardy was introduced. Judgment for plaintiff.

VANCLIEF, C.[64] [After stating the facts:] * * * There was no evidence tending to disprove the genuineness of this writing, or the signature of Hardy; but the testimony of McCarthy that the interest had been paid was disputed by the testimony of the plaintiff. But for the purpose of the question now being considered (that of ratification) it is immaterial whether the defendant paid the interest or not, for, whether she complied with the conditions upon which Hardy agreed to extend the time of payment or not, her averment, in her answer, that she authorized the procurement of the agreement for th extension of time, in the absence of evidence that she ever repudiated the execution of the notes or mortgage by her assumed agent, is prima facie sufficient evidence of her ratification of such execution. In Taylor v. Association, 68 Ala. 229, Brickell, C. J., said: "We do not mean that it was shown that there was assent to and confirmation of the transaction expressed in words. That is not essential, for ratification is more often implied from the acts and conduct of parties having an election to avoid or confirm than expressed in words; and it is implied whenever the acts and conduct of the principal, having full knowledge of the fact, are inconsistent with any other supposition than that of previous authority, or an intention to abide by the act though it was unauthorized." See, also, Mechem, Ag. §§ 146–157.

I think the power of attorney was admissible as a circumstance tending at least to strengthen the other evidence of a ratification, by showing the relation between defendant and McCarthy. It showed that McCarthy was not a stranger to defendant; that he was authorized to act as her attorney to some extent in regard to all her real property in this state, even though he may not have been authorized to mortgage it. "All the authorities," says Mr. Mechem (section 160), "agree that the relations of the parties have much to do in determining whether or not there has been a ratification." Where an author-

[64] Part of the opinion is omitted.

ized agent transcends his authority, the liability of the principal to be held to have ratified the unauthorized acts by mere acquiescence is much greater than it would be in case an utter stranger had assumed to act as agent without any authority for any purpose whatever; because, "in general, where an agent is authorized to do an act, and he transcends his authority, it is the duty of the principal to repudiate the act as soon as he is fully informed of what has been thus done in his name, * * * else he will be bound by the act as having ratified it by implication." Ward v. Williams, 26 Ill. 447, 79 Am. Dec. 385.

But where an utter stranger assumes to act as agent, without any authority for any purpose, the assumed principal is not required to repudiate so promptly, in order to repel the charge of having ratified the unauthorized acts by acquiescence; since in the latter case the assumed agent bears no ostensible relation as agent to the person for whom he assumes to act, and therefore third persons are not so liable to be deceived by his pretensions, it being their own fault if they deal with him as agent without some apparent evidence of his authority. And since the undisputed evidence made a prima facie case of ratification, the finding that the notes and mortgage were executed by defendant was thereby justified, the ratification being equivalent to original authority. * * *

Judgment and order reversed.[65]

HARTLOVE v. WM. FAIT CO.

(Court of Appeals of Maryland, 1899. 89 Md. 254, 43 Atl. 62.)

ROBERTS, J. This case was tried in the court below before the judge at large, sitting in the superior court of Baltimore city, without the intervention of a jury. The verdict and judgment being against the appellant, he has accordingly appealed. The facts are briefly as follows: The respective parties to this cause are both dealers in the canning and sale of tomatoes. The appellant authorized James Kean, a member of the firm of James Kean & Co., brokers in canned goods, to sell for him 2,000 cases of standard three-pound tomatoes; and on the 25th of March, 1897, he did, through the instrumentality of said agent. sell said tomatoes to the appellee, at 55 cents per dozen, or $1.10 per case, "net cash in ten days," September delivery, of the pack of 1897, with an allowance for labels of about one dollar per thousand, in plain cases, and to be delivered at the appellee's wharf in the month of September, 1897.

On this state of facts, it is contended on the part of the appellant that there is no evidence in the record legally sufficient to establish the

[65] See, also, Ballard v. Nye, 138 Cal. 588, 596, 72 Pac. 156 (1903); Lee v. Fontaine, 10 Ala. 755, 770, 44 Am. Dec. 505 (1846), quoting Story on Agency, 82, 83, 234 to 253; Kraft v. Wilson, 104 Cal. xvii, 87 Pac. 790 (1894).

contract sued on, which is admitted by the appellant to be the only question before the court upon this appeal, and is substantially the language of the appellant's third prayer, which was rejected by the court below. The evidence in the record shows plainly the acceptance of the bought note, and the only objections made to it by the appellant were his strictures upon the terms of payment made to Mr. Kean, his broker. There never was, until after the bringing of this suit, the slightest attempt by the appellant to repudiate the contract, either with the said broker for the appellee, or directly with the appellee itself. The price of canned tomatoes advanced rapidly in the early fall of 1897. On the 23d of September, 1897, the appellee wrote the appellant asking him to hasten the delivery of the tomatoes sold by Kean & Co. The appellant made no reply to this communication. And on October 18, 1897, the appellee again wrote him that he had failed to fulfill his contract as stipulated, and that suit would be brought against him if he did not deliver the goods as agreed upon by him. He then called on the appellee, and informed its president that he could not deliver the goods, because his factory had burned down, and the farmers had failed to meet their contracts with him, and that it would be useless to sue him, and no judgment could be made out of him. Kean, his broker, testified to several conversations with the appellant in which he made substantially the same statements as he had made to the appellee company. This action was then brought below, and for the first time the appellant set up the defense that he had never authorized the sale of the goods, and had never ratified Kean's action in making such sale; but the proof fails to sustain this contention. It is admitted on behalf of the respective parties to this appeal that the only question here to be considered and determined is whether there is any evidence in the record legally sufficient to show "that the appellant ever ratified the written contract, and agreed to deliver the goods therein mentioned to the appellee, net cash in ten days." It is in point of fact the sole question in the case. No exception as to the admissibility of the proof offered has been reserved, and the only contention arises on the refusal of the court to grant the third prayer of the appellant, which is, in effect, a demurrer to the evidence. The appellant's special exception to the appellee's first prayer, which was intended to raise substantially the same question which was presented by the appellant's third prayer, was overruled by the court.

It will be appropriate here to state the views of the learned judge who presided below, and has in plain terms correctly expressed the law of the case. In passing upon the motion made by the defendant for a new trial, Judge Dennis said: "When the case was first heard, I took a view (a view the correctness of which a fresh examination of the stenographer's notes of the testimony has confirmed) that the contract of sale negotiated through Capt. Kean, as agent of the defendant, and the plaintiff was complete. It is true that, when Kean presented to the defendant the 'sold note,' the latter objected to the item of ten days

of payment; but he did not repudiate the contract on that account, but took the 'sold note' and kept it, which he certainly would not have done had he intended to repudiate the contract. In the latter event, he would have refused to receive the note at all. Certainly nothing that was said or done on that occasion, or afterwards, ever led Kean to believe otherwise than that the transaction was completed, and he so reported to the plaintiff, to whom he gave the corresponding 'bought note.' And the defendant's subsequent conduct is wholly inconsistent with his present contention; for he not only kept the 'sold note,' but when, several months afterwards he was called upon by the plaintiff to perform the contract, he never repudiated it then; and when, shortly afterwards, he was threatened with suit if he did not comply, he defended his noncompliance by stating that he had suffered losses from fire and other sources, and was not able to carry out the contract,—thus recognizing, in the strongest way, the validity of the contract the existence of which he now disputes."

The rule of damages properly applicable in this case will be found embodied in the appellee's second prayer, which was granted by the court below, and is supported by McGrath v. Gegner, 77 Md. 338, 26 Atl. 502, 39 Am. St. Rep. 415; Pinckney v. Dambmann, 72 Md. 184, 19 Atl. 450; Brown v. Muller, L. R. 7 Exch. 319.

As to the question of ratification of the acts of the agent, it is not necessary that there should be any positive or express confirmation, and for this purpose the conduct of the principal is construed liberally in favor of the agent. Story, Ag. §§ 253, 255, 256, 258. Martin, J., delivering the opinion of the court in the case of Pitts v. Shubert, 11 La. 286, 30 Am. Dec. 718, says: "No principle is better settled than that he who is notified that a contract has been made for him, and subject to his ratification, by a person who pretended to have authority for that purpose, is presumed to ratify it, unless, immediately on being informed thereof, he repudiates it." Hatch v. Taylor, 10 N. H. 538; Benj. Sales, § 882.

From a careful examination of the ruling of the court below, we have failed to discover any error. It follows from what we have said that the judgment must be affirmed. Judgment affirmed, with costs to the appellee.

SANDERS v. PECK.

(Circuit Court of Appeals of the United States, Seventh Circuit, 1898. 30 C. C. A. 530, 87 Fed. 61.)

WOODS, Circuit Judge.[66] The bill in this case was brought by Joshua C. Sanders, the appellant, against Ferdinand W. Peck, William R. Page, Harvey W. Booth, and David T. Corbin, to set aside a sale of 22 bonds, of $1,000 each, executed by the Riverside Improve-

[66] Part of the opinion is omitted.

ment Company. The sale was made on September 10, 1890, by Corbin, as agent of the owners, to Peck, who was represented in the transaction by Page and Booth, and the bill charges a conspiracy of the defendants to cheat and defraud Sanders out of his interest in the bonds, and in certain decrees in which the bonds, excepting two, had been merged. The appellees answered, denying all fraud, averring a purchase in good faith through Corbin, who, as agent and attorney of the owners of the bonds, it is alleged, had full authority to make the sale, and setting up certain orders and decrees of the circuit court of Cook county, Ill., in the case of Peck against Chicago & Great Western Railroad Land Company and others, as an adjudication of Peck's title as against the title asserted by Sanders.

It is not found necessary to rehearse the numerous facts incident to this litigation. A few propositions are controlling. That Corbin had no authority to sell the two bonds which had belonged to Hendrickson is clear, and the preponderance of the evidence seems to us to be that the sale made of the other bonds was unauthorized, and that, having been notified of the appellant's ownership and of his denial of Corbin's authority before the purchase money was paid, Peck and his agents proceeded at their peril in an effort to consummate the sale by paying the price to Corbin and by taking assignments of the decrees, which, though obtained in the names of Ver Nooy and Temple, belonged to the appellant. But, though unauthorized, we are of opinion that Sanders ratified the sale by his subsequent conduct, when, with full knowledge of the circumstances, he entered into negotiations with Corbin for a settlement of the account between them on the basis that the sale was valid, and that Corbin was accountable to him for the price received for the bonds or decrees. In that negotiation, which was entered upon without any reservation of a right to repudiate the sale if a settlement should not be effected, a sum was agreed upon as proper compensation to Corbin for making the sale, and the difference between them which prevented an adjustment was in respect to a matter in no way connected with the sale of the bonds. This unreserved assertion of ownership of the proceeds amounted to recognition of the validity of the sale. A ratification once fairly made, it was not revocable. If it be said that this ratification did not extend to the Hendrickson bonds, of which Sanders was not then the owner, he is nevertheless in no better position, in respect of those bonds, because of his failure for more than a year after acquiring Hendrickson's title to question the sale. * * *

The decree below is affirmed.

DANAHER v. GARLOCK.

(Supreme Court of Michigan, 1876. 33 Mich. 295.)

Danaher had a contract for railway construction, and sublet a part of the work to Fohy & Dye. Garlock sues for the board of laborers, contracted for by Fohy & Dye. The evidence showed payment by Danaher's agent of a previous board bill upon their order.

PER CURIAM. We think there is no material distinction between this case and Wells v. Martin, 32 Mich. 478,[67] as to the proof introduced to show liability.

We discover no evidence in the record tending to show an original undertaking by Danaher, or any act of ratification, of any arrangement which Fahy & Dye may have made, and the bill of exceptions states that the substance of all the testimony given is set out; and the judge, after referring in his charge to the evidence supposed to bear on the point, stated that it was substantially the testimony produced by both parties.

The judgment should be set aside, with costs, and a new trial ordered.

TEBBETTS v. MOORE.

(Supreme Court of Judicature of New Hampshire, 1849. 19 N. H. 369.)

Assumpsit for goods sold and delivered. Verdict for defendant.

WOODS, J. No objection is made that the auditor's report was permitted to be read to the jury, in the form in which it was offered. We can therefore take no other view of it than as containing a statement of facts properly laid before the jury. It finds that the articles in question were ordered by the sons of the defendant, in his name, and by the plaintiffs delivered to the sons and charged to the father. That on former occasions articles had in like manner been delivered by the plaintiffs to the same individuals, and the defendant had paid for them, without objection, but without knowing that articles so ordered and delivered were included in the account.

[67] In Wells v. Martin, 32 Mich. 478 (1875), cited above, the court held that proof that defendants' paymaster had paid a portion of a previous bill on the order of a subcontractor, and had said they intended to pay the bill in suit, is no evidence of a ratification by his principal of authority in the person who incurred the debt.

But a mere effort on the part of the principal, after knowledge of the unauthorized act of the agent, to avoid loss thereby, will not amount to ratification, so as to relieve the agent from liability. Triggs v. Jones, 46 Minn. 277, 48 N. W. 1113 (1891), post, p. 190; Oglesby v. Smith, 38 Mo. App. 67 (1889).

Nor is an abortive attempt to settle with one's agent, who has surreptitiously sold one's property, a ratification of the sale, so as to preclude any remedy against the purchaser. Gilman Linseed Oil Co. v. Norton, 89 Iowa, 434, 56 N. W. 663, 48 Am. St. Rep. 400 (1893). See, also, Humphrey v. Havens, 12 Minn. 298 (Gil. 196) (1867) in which the principal had ratified a previous act of the agent of an entirely different character.

Two clear propositions may be stated upon these facts: First, the relation in which sons stand to a father involves no authority on their part to contract debts in his name and in his behalf. They cannot bind him by their acts, without authority emanating from his own will to do so, any more than mere strangers can. In the case of things necessary for their support, the relation of a father to his sons may be shown in aid of other proof of the authority of the latter; but such is not the present case.

The second proposition is that the ground upon which the law raises a presumption of authority in an agent from a course of previous acts,[68] is that those acts have been done with the consent or acquiescence of the principal, and, of course, with his knowledge. For to say that one has assented to an act, without knowing that it has been performed, is an absurdity in terms. Perhaps the facts which are commonly received and are legally admitted as evidence of this knowledge may sometimes exist consistently with a want of it. And such is the nature of evidence in general. But proof that the supposed principal knew of the acts shown in evidence of the agency is always required.

Among the strongest acts of ratification is payment. It is evidence that the party knew and approved of the act so ratified. But it is evidence which may be rebutted, and is rebutted in the present case, by proof which satisfied the mind of the auditor, and, as was suggested in the outset, must satisfy us. The judge therefore correctly instructed the jury that no inference could legally be made from the payments made by the defendant for articles ordered by his sons and delivered to them by the plaintiffs, such payment having been made without any knowledge on the defendant's part that he was paying for such things; and there must be

Judgment on the verdict.

WOODS v. FRANCKLYN.

(Common Pleas of New York City and County, 1892. 19 N. Y. Supp. 377. 46 N. Y. St. Rep. 396.)

Action by Woods to recover for work, labor, and services performed by request of defendants' alleged agent. Appeal from judgment for plaintiff.

BISCHOFF, J. The decisive question in this case is whether plaintiff has established, by competent evidence, authority on the part of Still-

[68] A power of attorney to do future acts does not amount to a ratification of acts already done. Britt v. Gordon, 132 Iowa, 431, 108 N. W. 319, 11 Ann. Cas. 407 (1906). Especially if the power is conditioned upon certain events which do not transpire. Ticonic Water Power & Mfg. Co. v. Lang, 63 Me. 480 (1874); Bell v. Cunningham, 3 Pet. 69, 7 L. Ed. 606 (1830); Brown v. Foster, 137 Mich. 35, 100 N. W. 167 (1904).

man to bind defendant as his principal. In considering this question, evidence of Stillman's declarations tending to show his authority to act for defendant should be eliminated, because it is admissible for no such purpose, but only for the purpose of showing credit was intended to be given to the defendant. Stringham v. Insurance Co., 4 Abb. Dec. 315; Marvin v. Wilber, 52 N. Y. 270; People's Bank v. St. Anthony's R. C. Church, 109 N. Y. 512, 17 N. E. 408.

Outside such declarations the validity of the judgment depends upon facts substantially as follows: Plaintiff performed certain work, labor, and services in repairing the buildings 873 and 879 Broadway and 17 East Eighteenth street, which were owned by Sir Bache Cunard, upon Stillman's request and representation that he was authorized by defendant to employ plaintiff for such purpose. Of these premises Stillman had assumed full management and control at the request of the defendant; but the defendant, in making such request, acted for and as the agent of Cunard, the owner. Stillman did whatever he thought necessary for the preservation of the premises, caused repairs to be made, collected rents, paid expenses, and remitted the balance to defendant for the owner's, Cunard's, account. Prior to plaintiff's last employment and the accruing of the claim in suit he had performed similar services under precisely the same circumstances, for which, at Stillman's direction, he on one occasion rendered a bill to defendant, which was paid when presented.

It cannot be said that the facts recited would support an inference of Stillman's authority to bind defendant, construed most favorably to plaintiff, despite Stillman's apparent equivocation as a witness for him. It is obvious, though Stillman entered upon the agency of Cunard's buildings at defendant's request, that he was Cunard's, and not defendant's agent. The fact that defendant was the depositary of the rents accruing to Cunard from the buildings no more had the effect of substituting defendant for Cunard as principal than would an agent's deposit in any case of his principal's funds with a banker for transmission create the relation of principal and agent so as to charge the banker with liability for the acts of the depositor. It is true that authority to do a particular act may be inferred by a course of dealing between an alleged principal and his assumed agent, as in a case where a principal has repeatedly recognized and approved of similar acts. (Bank v. Putnam, 1 Abb. Dec. 80; Wood v. Railroad Co., 8 N. Y. 160; Hammond v. Varian, 54 N. Y. 398; Olcott v. Railroad Co., 27 N. Y. 546, 84 Am. Dec. 298; Bank v. Clements, 31 N. Y. 33;) but we are unable to find any sanction in principle or authority for holding that the ratification of a single act would justify an inference that any further similar act would likewise meet with recognition, or that the assumed agent is thus empowered to subject the alleged principal to liability upon subsequent unauthorized contracts. For this reason we must regard defendant's payment of plaintiff's bill for services on a former occasion insufficient to justify the inference that Stillman had

authority from defendant to employ plaintiff as his agent.[69] The facts therefore did not authorize plaintiff's recovery, and the motion to dismiss his complaint should have been granted.

Judgment reversed, and a new trial granted, with costs to appellant to abide the event.

WADE v. WOLFSON.

(Supreme Court of New York, Appellate Term, 1904. 90 N. Y. Supp. 1078.)

Action for goods sold and delivered. From judgment for defendant, plaintiff appeals.

PER CURIAM. The defendant's wife had no apparent authority to to bind him to the purchase of stock for his perfumery business, and, crediting his testimony, there was no ground for holding him to a ratification, his acts in relation to the goods being in no way inconsistent with the actual oral agreement made by him with the salesman, whereby he (defendant) was to sell the goods on commission. That this was the agreement, the justice has found upon a simple conflict of evidence, and there is nothing improbable in the defendant's assertion that he knew of no other.

Judgment affirmed, with costs.[70]

(b) ACCEPTING BENEFITS

HANEY SCHOOL FURNITURE CO. v. HIGHTOWER BAPTIST INSTITUTE.

(Supreme Court of Georgia, 1901. 113 Ga. 289, 38 S. E. 761.)

Action on an open account for thirty school desks, a reading chart, and some blackboards. Defendant was a corporation, created to carry on a school, and was managed by a board of trustees. This board hired one Booth as principal of the school, and he had bought the supplies sued for. Judgment for defendant.

LITTLE, J. [After stating the facts and ruling on a motion by

[69] That a railway company had paid a physician, hired by a conductor, to attend a person injured by his train, does not show a ratification of such unauthorized employment, so as to bind the company for a subsequent unauthorized employment of the physician for another person injured. Wills v. Int. & G. N. R. Co., 41 Tex. Civ. App. 58, 92 S. W. 273 (1906). But a single act of an agent and a recognition of it by the principal may be so unequivocal and of so positive and comprehensive a character as to place the authority of the agent to do similar acts for the principal beyond any question. The value of such proof does not depend so much upon the number of acts as upon their character. If the evidence is doubtful, it is a question for the jury. Wilcox v. C., M. & St. P. R. Co., 24 Minn. 269 (1877).

[70] Accord: Bromley v. Aday, 70 Ark. 351, 68 S. W. 32 (1902); White Sewing Mach. Co. v. Hill & Co., 136 N. C. 128, 48 S. E. 575 (1904).

plaintiff on a motion to amend the petition:] * * * 2. Plaintiff sought to have the verdict set aside on the ground that it was contrary to the evidence, and without evidence to support it. It is our opinion that under the evidence the plaintiff was entitled to have a verdict in its favor. It is undeniably true that the board of trustees were unwilling to have a debt created against the corporation which they represented, and it is equally true that they did not authorize Booth to create the debt on which the suit was brought. It cannot be gainsaid, however, that by their express and recorded action they did authorize Booth to purchase certain equipment for the school, although in doing so they limited him to the expenditure of the amount of money on hand; and clearly, as an original proposition, he had no right to go beyond it, nor to create any debt at all. But in authorizing Booth to purchase the equipment to the extent of the funds on hand they constituted him their agent that far. When he went beyond that limit, he exceeded his authority, and could not primarily contract a debt which, without their acquiescence, would be binding on the corporation. It is a clear case of the agent exceeding his authority. In such a case, in order to bind the principal, it must appear that he in some way ratified the unauthorized act. If he did, he is liable; if he did not, he is in no way liable for the debt.

Section 3019 of the Civil Code declares that a ratification by the principal relates back to the act ratified, and takes effect as if originally authorized. A ratification may be express, or implied from the acts or silence of the principal, and a ratification once made cannot be revoked. We accept the evidence of members of the board of trustees who were sworn in this case as true, and as a matter of fact it must be conceded that when the board ascertained that Booth had exceeded his authority, and purchased the desks and other equipment of the school on a credit, they in words repudiated that action, and notified plaintiff through its attorney that the goods bought were subject to its order. Therefore they were not silent, and the ratification of Booth's contract cannot be declared in this case from the silence of the principal. The question, then, is narrowed to the inquiry whether the board of trustees ratified this contract of Booth by their acts. It was undoubtedly originally contemplated that the schoolroom should be supplied with desks and other equipment according to the means in the hands of the trustees. It cannot be made a cause of difference in the determination of the question of liability that Booth took the school for what he could make out of it. The school building and the equipment which it contained were the property of the corporation, and under the direct control of the trustees, and in turning over the school building and the furniture therein to Booth the trustees of the defendant corporation were but carrying out the object of the incorporation, which was to maintain a school. It is conclusively shown that, while the trustees were unwilling to better equip the school building by incurring a debt, yet, after having learned that the desks, etc.,

which were placed in the school building for the use of the school which they were appointed to maintain, had been purchased by Booth on credit, they allowed such desks and other equipment to remain in said school building, and be used by the president and scholars from the time of such discovery up to the time of the trial of the case.

The trustees, then, are placed in this position: They did not authorize Booth to purchase this furniture on credit. As soon as they learned he had done so, they notified the seller that Booth had no authority to contract the debt for them, and that they would not be bound thereby, and disclaimed title to the property. Had they stopped here, and caused this property to be taken from their building, or stored it unused there or elsewhere, their claim would have been perfectly sustained; but, after having disclaimed title, the fact remains that they continued to use it for a year or more, having all the benefits of it, and, notwithstanding their disclaimer, kept it for the use of the school. It must be held that such action ratified the purchase made by Booth. It is not a sufficient answer to this proposition to say that this equipment is being used by Prof. Callaway, the successor of Booth. This is so for the reason that Callaway was put there by the trustees, and was furnished the school building and the furniture belonging to it. When Booth left the building, he left therein this equipment, which the defendants claimed belonged to the plaintiff. Callaway was admitted by their action, and permitted by them to use the furniture which was in their building, and this, having been bought by Booth in their name, and placed in their building, they should, in some manner, have excepted such furniture from Callaway's control in carrying on the school for them. They could not permit such use of it by him as a part of the furniture of their school building without working a ratification of the purchase made by Booth. And, while a disclaimer of title and notification to the seller that the trustees of the school building had no claim to this furniture which was being used therein was made, it was not, alone, such a sufficient repudiation as would free the trustees from liability if they continued to use it in the business of their corporation.

In the case of Wright v. Methodist Church, 72 Minn. 78, 74 N. W. 1015, the pastor of a church purchased an organ for the use of the church, and claimed that it was purchased by its authority. This was denied. At the time of its receipt the trustees of the church did not know that it had been purchased, but were told that the pastor had ordered it for a particular occasion. After ascertaining the fact of the purchase, the trustees notified the plaintiff that the pastor had no authority from them to purchase the organ, but it was allowed to remain in the church, and was continually used therein. The supreme court of Minnesota, in passing on these facts, ruled that, if the pastor was not originally authorized to purchase the organ for the church, under the facts its trustees subsequently ratified his acts. The general rule is found stated in Mechem, Ag. § 148. The

author precedes a statement of the rule with the assertion that the methods by which ratification may be effected are as numerous and as various as the complex dealings of human life. But he adds that: "He who would avail himself of the advantages arising from the act of another in his behalf must also assume the responsibilities. If the principal has knowingly appropriated and enjoyed the fruits and benefits of an agent's act, he will not afterwards be heard to say that the act was unauthorized. One who voluntarily accepts the proceeds of an act done by one assuming, though without authority, to be his agent, ratifies the act, and takes it as his own, with all its burdens as well as all its benefits. He may not take the benefits and reject the burdens, but he must either accept them or reject them as a whole."

This court, in the case of Byrne v. Doughty, 13 Ga. 52, citing Story, Ag. says: "To bind the principal, there is no necessity for a positive or direct confirmation on his part of the act of the agent, but it may arise by implication from the acts or proceedings of the principal in pais. * * * And for this purpose the acts and conduct of the principal are construed favorably in favor of the agent. Slight circumstances and small matters will sometimes suffice to raise the presumption of ratification. * * * Authority to do the act is presumed from subsequent acts of assent and acquiescence." In the case of Hodnett v. Tatum, 9 Ga. 70, it was ruled that the principal cannot, of his own mere authority, ratify the acts of his agent in part in regard to a particular transaction, and repudiate them as to the rest; and in the opinion, Judge Warner, referring to the facts in that case, said: "If he [the principal] did not intend to ratify the act of his agent in receiving the Alabama money, he ought to have returned it within a reasonable time, and not have retained it upon his own arbitrary terms." McCay, J., in the case of Ketchum v. Verdell, 42 Ga. 538, said: "If the principal accepts the property knowing all the facts, that is a ratification of the agency." In Murray v. Walker, 44 Ga. 58, it was ruled that "the taking of Confederate currency by the principal, and its use by him, was a ratification of the act of the agent." To the same effect is the ruling made in the case of Gilbert v. Dent, 46 Ga. 238.

The trustees of the defendant corporation were evidently unwilling to create a debt, and did not intend to buy this furniture on credit, and they had the right to refuse to do so if they wished; but, when they discovered that Booth had purchased the furniture on their account, then was the time not simply to repudiate the action of Booth in words, but to repudiate it altogether. If, after such discovery, they had declined to use the desks and other property sold, which, being in their building as a part of the equipment, were being used by them through Callaway, their agent, but had returned them or taken them out of their building after proper notification, their wishes would have been accomplished. But when, after the knowledge of Booth's purchase, they continued to use it by their agent and employé knowing that Booth claimed

to have bought it for them, that use of it made it their property by ratification.[71] Its use by the school was their use.

It must therefore, be ruled that, as this evidence of ratification and use of the property was uncontradicted, the verdict rendered was contrary to the evidence in the case, and the court erred in overruling the motion for a new trial. Judgment reversed.

[71] In U. S. School Furniture Co. v. School District, 56 Neb. 645, 77 N. W. 62, upon a suit for money paid to an agent of plaintiff for school furniture, the court said: "The defendant contends that the furniture company, with full knowledge of the material facts, ratified and approved the act of its agent in collecting the money due to it from the school district. We think this contention is sustained by the undisputed proof. The plaintiff authorized Murdock to deliver the furniture and set it up in the schoolroom. In doing this it was necessary that he should pay freight charges, drayage, and other expenses. With the money obtained from the defendant he paid these charges, and advised his principal of the fact. His principal found no fault and made no objection. It cheerfully acquiesced in this part of the transaction, and has not at any time offered to reimburse the defendant to the extent that the money collected was applied to its use and for its benefit. Even at the trial it did not offer to credit the school district with the amount so applied. Having determined to sue for the full contract price of the furniture, it was certainly the plain duty of the furniture company to tender back to the defendant so much of the money paid to Murdock as had been necessarily expended by him in performing the conditions of the contract. The retention of such money, while attempting to coerce payment of the entire sum for which the furniture was sold, puts plaintiff in the incongruous attitude of holding fast to the fruits of an agency while insisting that the agency never existed. This it cannot do. A principal must adopt the acts of his agent as a whole. He will not be permitted to retain the part which is beneficial and reject that which is not. Rogers v. Hardware Co., 24 Neb. 653, 39 N. W. 844; Manufacturing Co. v. Wagoner, 25 Neb. 439, 41 N. W. 287; Waterson v. Rogers, 21 Kan. 529. The plaintiff by its conduct clearly ratified the acts of Murdock so far as they were advantageous to it, and that, in contemplation of law, amounted to a ratification of the entire transaction."

The Pennsylvania court, by Green, J., in Wheeler & Wilson Co. v. Aughey, 144 Pa. 398, 22 Atl. 667, 27 Am. St. Rep. 638, put the case thus: "It is of no avail to raise or discuss the question of the means of proof of the agent's authority. The very essence of the rule is that the agent had no authority to make the representation, condition, or stipulation by means of which he obtained the property or right in action of which the principal seeks to avail himself. It is not because he had specific authority to bind his principal for the purpose in question that the principal is bound, but notwithstanding the fact that he had no such authority. It is the enjoyment of the fruits of the agent's action which charges the principal with responsibility for his act. It is useless, therefore, to inquire whether there is the same degree of technical proof of the authority of the agent, in the matter under consideration, as is required in ordinary cases where an affirmative liability is set up against a principal by the act of one who assumes to be his agent. There the question is as to the power of the assumed agent to impose a legal liability upon another person, and in all that class of cases it is entirely proper to hold that the mere declarations of the agent are not sufficient. But in this class of cases the question is entirely different. Here the basis of liability for the act or declaration of the agent is the fact that the principal has accepted the benefits of the agent's act or declaration. Where that basis is made to appear by testimony, the legal consequence is established. Mr. Justice Sharswood, in the case above cited, after enumerating many instances in which the doctrine was enforced, sums up the subject thus: 'Many of these cases are put upon an implied authority, but the more reasonable ground, as it seems to me, is that the party having enjoyed a benefit must take it cum onere.'"

COYKENDALL v. CONSTABLE.

(Court of Appeals of New York, 1885. 99 N. Y. 309, 1 N. E. 884.)

Action upon a note. Judgment for defendant.

FINCH, J. If the note upon which this action is founded was not paid, its makers were liable, unless those of them who were sureties became freed from their obligation by reason of some act which changed their contract or imperiled their rights. The referee does not find such payment as a fact, nor as an inference from the facts ascertained. Indeed, it is difficult to see how any such inference could have been possible from the proof. Whatever may be true as to the want of authority to sell the note in the bank which received it for collection, it is quite certain that the transaction between the plaintiffs and the collecting agent was a sale, or an entirely void proceeding. It could not be transformed into a payment in hostility to the expressed intentions of both parties who acted in the transfer. There was a sale, or an attempt at a sale, which utterly failed, but never a payment; and an erroneous supposition by Peters, the payee, as to the fact which produced the money, traceable to his ignorance of the truth, cannot alter the nature of that truth. The note being, then, unpaid, is due from the makers to some one, and must be payable to Peters or the plaintiff.

The only concern of the defendants, if the rights of the sureties have not been infringed, is to know to which of two parties they may safely pay the debt. If they had paid it voluntarily to plaintiff, could Peters, after full knowledge of the situation, and with the plaintiff's money in his pocket, and persistently retained, successfully sue upon it as owner? It is quite certain that he could not. He would be unable to produce the note, and could not force it from plaintiff's possession without return of the purchase money, and, while keeping that, would be obliged to admit that he held it as a payment of the note or consideration of its sale, and either alternative would be fatal to his cause of action. The defendants thus can pay the debt which they have not paid to the plaintiff, as its holder, with entire safety, and without danger of being liable to Peters. Why, then, should they not pay it? If the transaction had been found to be, or shaped upon competent proof as, an advance by plaintiff to De Garmo, the maker, of the money necessary to pay the note, the successful defense would have been payment; but when nothing of the kind was either done or intended, or found as a fact, and the note remains unpaid, why should not its maker pay it? It is not claimed that the sureties directed or required its collection, or put the owner, whoever he might be, under a duty to enforce it. Their contract was not changed. They promised to pay to Peters or bearer, and the plaintiff is the bearer, and comes to them with that title, and in accord with their contract. They

agreed that the note might be sold when they made their contract negotiable. No right of theirs was violated, and they suffered no injury. If they desired the note promptly sued, they could say so as well to plaintiff as to Peters, or pay it and take their remedy against De Garmo.

Their sole defense, therefore, was that which prevailed with the referee: That the bank had no authority to sell, and so plaintiff got no title. Undoubtedly, Peters might have repudiated the act of his agent, when he learned what it was. The moment he became possessed of that knowledge, he was bound in common honesty to return the money paid him by mistake, or retain it as it was given to his agent. The law will not endure that he shall keep the product of the agent's act and yet repudiate his authority. Even in a case of fraudulent representations by the agent, never at all authorized or suspected by the principal, a reception and retention of the proceeds may make the latter responsible for the fraud. National L. Ins. Co. v. Minch, 53 N. Y. 144; Hathaway v. Johnson, 55 N. Y. 93, 14 Am. Rep. 186. No wrong or violence is done to the rights of Peters by the process. His agent obtained plaintiff's money by a pretended sale of the note in excess of the authority conferred, and Peters knows it. If, then, he keeps the money, and avails himself of the fruits of the unauthorized act, he cannot be allowed to repudiate it. But he does not repudiate it, or attempt to do so. He sets up no claim to the note, and says only that he wanted the money and did not care how he got it; that is, whether by a sale or a payment. The fact, then, that the note was not paid, and he knew it, although for a time he thought that it was, followed by his continued retention of the money, his omission to demand the note, or assert any title to it, admits of no other interpretation than a ratification of the sale.[72] It is all the more easily inferred because

[72] See, also, Waterson v. Rogers, 21 Kan. 529 (1879), in which it was said by Brewer, J.: "Upon these facts we remark that one who voluntarily accepts the proceeds of an act done by one assuming, though without authority, to be his agent, ratifies the act, and takes it as his own, with all its burdens, as well as its benefits. He may not take the benefits and reject the burdens, but he either accepts or rejects them as a whole. This is a general proposition, to which, of course, there may be exceptions and limitations. But still it is potent in this case as showing that there was some testimony from which a jury might deduce a ratification by him of the acts of the wife. He acted knowingly, and repudiated nothing of benefit to himself. Can he avoid the burdens? Counsel say that Gallagher abandoned the farm, and that Rogers was compelled to take it or let it run down, and that such mere measure of protection ought not to be construed as a ratification of the unauthorized act of his wife. But his action was not limited to that. He took possession of the hay which had belonged to Gallagher, and was given him by the arbitrators, and fed it to his stock. The cattle and also the horses which he had turned over to Gallagher, and which were returned only in pursuance of the arbitration, he keeps the possession of. And, in the letter which he wrote on receipt of the news, he does not deny his wife's authority, or propose to repudiate the entire action, but only to contest the payment of these notes. Nowhere does he insist upon Gallagher's continuing the lease, or the contracts he had made with him, or offer any objection to the termination of these, and

his interest lay in that direction. It made the money in his possession lawfully his, and took him wholly out of the controversy. It is just to the plaintiff, who parted with his money as purchaser, and upon the faith and credit of the note. It does no injustice to the sureties, for they have no equity to be discharged without payment. Circumstances might have occurred which would have entitled them to a release. Possibly, if they had been lulled into a false security by information and a consequent belief that the note was paid, and due to the silence and delay of the purchaser, the principal in the mean time becoming insolvent, some just ground might exist for their discharge. But nothing of the kind is in the case. No such defense is pleaded, and no suggestion made of any injury resulting from the sale. The evidence shows that Terwilliger, one of the sureties, was notified of a proposed transfer, and not only did not object, but promised to see his associates. They say only that they never consented to a sale. They do not say that they were not notified of an intended transfer; and since they make no complaint, either in the pleadings or the proof, that they have been misled or harmed by the transaction treated as a sale, and ratified as such by Peters, there is no injustice done to them. Certainly, they have no equity to compel the plaintiff, in hostility to his intention and against his will, to pay their note, for which he was in no manner bound.

We find no difficulty, therefore, in applying to the case the doctrine of ratification. Coykendall made the purchase before he had seen the note or the indorsements upon it. Peters knew the whole truth,—at least, when examined as a witness on the trial,—and, instead of repudiating the sale, said only that he got the money for his loan, "and that was the end of it."

The cases cited by the respondent are not inconsistent with our view of the transaction. Some of them were founded upon statutes relating to corporations, and making certain transfers void because illegal. Gillet v. Phillips, 13 N. Y. 114; Houghton v. McAuliffe, 26 How. Prac. 270. In one of them the agent of the payee did not sell, or intend to sell, the note, and nothing was said which necessarily gave him notice of a different intention on the part of the person taking the note. Burr v. Smith, 21 Barb. 262. Beyond the cases cited, our attention has been incidentally drawn to one which tends in many respects to justify the contention of the respondents: Fuller v. Bennett, 55 Mich. 357, 21 N. W. 433. It is observable, however, that the question of payment arose, and upon a very debatable state of facts; and also that the payee never knew that his note was not paid until five years after the money was received, and when the situation of the par-

the surrender of the property back to himself. Now, it seems to us that in these matters there was testimony tending to show a ratification. We do not mean to be understood as saying that it was conclusive, or was not subject to explanation or contradiction; but we do hold that, if upon it the jury had found there was a ratification, we should not have felt warranted in setting aside the verdict as entirely without support."

ties had been changed by the intervening death of the maker. Our great respect for the learned judge who wrote the opinion has caused us to give additional reflection to the views we have expressed, but has not shaken our conviction that in this case the title of the plaintiff to the note sued upon was good.

The judgment should be reversed, and a new trial granted; costs to abide the event.

WILLIAMS v. STORM.

(Supreme Court of Tennessee, 1869. 46 Tenn. [6 Cold.] 203.)

GEORGE ANDREWS, J. Mrs. Storm, the defendant, was the equitable owner of a farm in Roane county. With the purpose of cultivating and improving the premises, she leased them to one Brinkman, and also constituted him her agent, to make certain improvements upon the estate, the nature and character of which improvements do not appear in proof. For the purpose of enabling Brinkman to carry on the farm, and make the necessary improvements, Mrs. Storm gave him a letter of credit, authorizing him to draw on one De Armond, to the amount of three hundred dollars. De Armond being unable, or unwilling to furnish the money, Brinkman applied to W. S. McEwen, who agreed, upon the personal guaranty of Brinkman, to furnish the required credit, and did accordingly supply Brinkman with cash and various articles for the use of the farm, to the amount of over three hundred dollars. Two hundred and fifty dollars of this amount, and perhaps the whole, was afterwards repaid to McEwen by Mrs. Storm.

But Brinkman, after this time, requiring further supplies, and McEwen being unwilling, in consequence of delay in the former payment, to make further advances, Brinkman presented the letter of credit to complainant, Williams, who, upon the credit of Mrs. Storm, gave to Brinkman a letter of credit to McEwen, for the further amount of three hundred dollars. It does not appear whether Williams was aware of the previous advances made by McEwen. Upon the credit of Williams, thus obtained, Brinkman procured from McEwen, cash and other articles, to the amount of about three hundred and eighty dollars, which were employed, as Brinkman testifies, in improvements and expenses on Mrs. Storm's land, but in what manner does not appear. This amount has been repaid to McEwen by complainant.

Mrs. Storm resided in Europe, and there is no evidence that she had any knowledge of the transaction with Williams, till the filing of complainant's bill. The bill in this cause, is filed by Williams, to compel payment by Mrs. Storm, of the amount thus advanced by him. Upon the hearing, on pleadings and proof, the chancellor dismissed the bill, and the complainant appealed to this court.

The letter of credit given by Mrs. Storm to Brinkman, and addressed to De Armond, constituted no authority to Brinkman to pro-

cure this loan by credit from Williams, and there is no proof whatever, that Brinkman had any authority, as Mrs. Storm's agent, to bind her in the transaction. But it is claimed for complainant, that Mrs. Storm, by her conduct, held Brinkman out to the world as her agent, and thus rendered herself liable for any contracts he might make in her name, and that, as the supplies procured through complainant's credit were applied to her use and benefit, she is legally bound to pay for them. There is nothing to show that, in the present case, Mrs. Storm held Brinkman out to the world as her agent, duly authorized to borrow money, or to purchase property on credit in her name. There is nothing in the agency proven to have existed, which requires the existence of such authority; and the simple fact, that she paid the debt first incurred by Brinkman to McEwen, cannot be considered as a binding admission on her part, of his authority to make similar contracts in her name in the future.

There is no proof that Williams knew of the former transaction with McEwen. So far as appears, he proceeded solely upon the letter of credit to De Armond, which was exhibited to him, and upon his belief in the good faith of Brinkman, and the responsibility of Mrs. Storm.

The authority of Brinkman extended only to the borrowing of the sum of three hundred dollars, and that only upon his letter of credit to De Armond. And even if that authority were held to extend to the borrowing of that particular sum of McEwen, instead of De Armond, it was then exhausted, and could not be extended into a general authority to borrow as many sums and of as many different persons as he might subsequently think fit to require. The complainant had notice of Brinkman's want of authority; and though his case is a hard one, he must be held to have loaned to him his credit at his peril.

The general rule is unquestioned, that, if an agent exceeds his authority in purchasing property, or otherwise making engagements in the name of his principal, and the principal knowingly receives and retains the property, or accepts the benefit of the engagement made, he thereby ratifies the contract made by his agent. But this rule only applies in cases where the principal has knowledge of the transaction, and an opportunity to repudiate the acts of the assumed agent.[78]

If an agent has, by acts and contracts, beyond the scope of his authority, and without the knowledge of his principal, purchased property or borrowed money in the name of his principal, and expended the same in the care, preservation, or improvement of his principal's estate; and at the time when the transaction comes to the knowledge of the principal, the property has been consumed, or expenditures made in such manner that the property cannot be restored, or the con-

[78] See, also, Bryant v. Moore, 26 Me. 84, 45 Am. Dec. 96 (1846). If the principal has sold the property received from the agent before he has knowledge, a failure to return it is no ratification. Martin v. Hickman, 64 Ark. 217, 41 S. W. 852 (1897).

tract repudiated, the principal is not bound. Where the principal has the option to repudiate the contract, or to ratify it, he is bound promptly to do either the one or the other. But a party cannot so deal with an unauthorized person assuming to act as agent, as to leave the principal no option, and to compel him by force of the mere fact that the transaction has been for his benefit, to ratify the contract. 1 Am. Lead. Cases, 574.

It does not appear in this case, how the money obtained by Brinkman, upon the complainant's credit, was expended; what improvements were made; what expenses of the farm were defrayed or what property purchased by its means or whether any such property or improvements remain for the benefit of the defendant, or that the improvements and purchases were such as Brinkman was authorized by her to make; and while the hardship to the complainant is obvious, it cannot be permitted that unauthorized persons shall make improvements in their own discretion, upon the estates of others, without the knowledge of the owner, and when too late to repudiate the unauthorized action, call upon the owners to ratify it by payment of the expenses incurred. It may or may not be, that the benefit accruing to the defendant in this case, may impose upon her a moral obligation to pay for these purchases, expenses and improvements; but to hold that the obligation is a legal one, would place it in the power of unauthorized persons, to improve the holders of property out of their estates.

The decree will be affirmed.

(c) By Silence

ST. LOUIS GUNNING ADVERTISING CO. v. WANAMAKER & BROWN.

(St. Louis Court of Appeals, Missouri, 1905. 115 Mo. App. 270, 90 S. W. 737.)

Action for rentals for six months advertisements on billboards, owned by plaintiff. The advertising contract had been made by one Lurie, "selling agent" of defendants. Plaintiff claimed (1) that if Lurie had not authority to advertise for defendant, defendant by failing to reply to a letter written by plaintiff about the contract had ratified the same; and (2) that Lurie's authority was ample in any case. From judgment for $300, defendant appeals.

Goode, J.[74] 1. The ground for a verdict in favor of the plaintiff allowed by the instructions was that defendant had ratified the contract made by Lurie in its name. The first instruction treated the defendant's failure to disclaim liability within a reasonable time after receiving plaintiff's letter of November 20th as in itself a ratification. Every fact hypothesised in that instruction was undisputed. Hence the charge was equivalent to directing a verdict for the plaintiff. We

[74] Part of the opinion is omitted.

think the instruction went too far, in view of the fact that plaintiff had already performed half the contract before it wrote the letter and could not have been induced by defendant's silence to render that much of the agreed service, and of the further fact that defendant's silence did not induce the plaintiff to refrain from proceeding against Lurie personally while it might have collected the rent from him. The silence of a principal, after receiving notice that his agent has assumed to bind him by an unauthorized act, may be a fact to be weighed on the issue of whether the principal ratified the act, or may raise a presumption that he ratified it, according to circumstances. If the controversy between the agent and the third party is completed before the principal is notified, so that no detriment can result to the third party from the silence of the principal, his failure to repudiate the act is evidence, to be considered with other facts in the case, that he adopted it as his own, or ratified it. Union Gold Mining Co. v. Bank, 2 Colo. 248, 262; Breed v. Bank, 4 Colo. 481, 507; Culver v. Ashley, 1 Am. Lead. Cas. (5th Ed.) p. 719, note; Hortons v. Townes, 6 Leigh, 47, 60; Bryant v. Moore, 26 Me. 84, 87, 45 Am. Dec. 96; Bates' Ex'rs v. Best's Ex'rs, 13 B. Mon. 215, 218; Corser v. Paul, 41 N. H. 24, 31, 77 Am. Dec. 753; Philadelphia, etc., Ry. v. Cowell, 28 Pa. 329, 70 Am. Dec. 128. And it will be conclusive evidence of ratification if not explicable on any other theory. Bank of Ky. v. Schuylkill Bank, 1 Pars. Eq. Cas. 180, 267; Hart v. Dixon, 5 Lea, 336, 339. But if the transaction is still in progress, and the silence of the principal after notice induces the party dealing with the agent to pursue a course which would be detrimental to him, if the principal is not held bound, a ratification of the unauthorized act will be presumed.

This result will obtain when the person dealt with is induced to alter in any way his position to his detriment, as by parting with money or property on the assumption that the agent's act was valid, or omitting to take steps against the agent, or otherwise to improve his position. Union Mining Co. v. Bank and Breed v. Bank, supra. The result will obtain, too, when the principal accepts the benefit of what the agent did. McLachlin v. Barker, 64 Mo. App. 511. The cases abound in such remarks as that a principal must disavow the conduct of an agent done in excess of authority, in a reasonable time after getting notice of it, on pain of being deemed to have assented to the conduct; and some decisions hold that the disavowal must be immediate. But the prevalent doctrine is that it must occur in a reasonable time. These remarks are to be construed with reference to the facts before the court; and we think the true doctrine is that a conclusive presumption of acquiescence is raised from a principal's silence only when otherwise loss would fall on an innocent party. The contrary doctrine would be arbitrary and irrational; and such rules of law should be avoided. An examination of numerous cases has shown that in every instance wherein the presumption of ratification was raised because of a principal's silence some change in the position of the parties con-

cerned occurred subsequent to notice to the principal which would have resulted in injustice to the party dealt with by the agent if the principal had been excused on the score of want of authority in the agent. We cite illustrative decisions on the point. Peck v. Ritchey, 66 Mo. 114; Teasdale v. McPike, 25 Mo. App. 341; Johnston v. Berry, 3 Ill. App. 256; Hanks v. Drake, 49 Barb. 186; Hawkins v. Lange, 22 Minn. 557; Farwell v. Howard, 26 Iowa, 381; Cooper v. Schwartz, 40 Wis. 54; Pittsburgh, etc., Ry. Co. v. Woolley, 12 Bush, 451; Marshall v. Williams, 2 Biss. 255, Fed. Cas. No. 9,136; Woodward v. Suydam, 11 Ohio, 360; Matthews v. Fuller, 123 Mass. 446; Foster v. Rockwell, 104 Mass. 167; Ruffner v. Hewitt, 7 W. Va. 585.

The real ground on which the principal is held liable under such circumstances is that of estoppel, though it is often said that the principal ratified what was done by his agent by remaining silent. Teasdale v. McPike, 25 Mo. App. 341; Hoppe v. Saylor, 53 Mo. App. 4. In its genuine sense ratification depends on intention. It is the voluntary assumption, on full information, of an unauthorized act or agreement by the party in whose behalf it was done or made. The intention to ratify may be manifested by express words or by conduct. Either may establish that the principal elected to adopt the act or agreement as his own; and the election once made with knowledge of the facts becomes irrevocable. Besides a true ratification intentionally made, the law recognizes a constructive one where none was intended. The latter sort of ratification is a legal presumption, raised against the principal because he has behaved in such a way that the party dealt with by the agent would be injured if the transaction was repudiated.

It is really an equitable estoppel, and is regulated by the law of estoppel. The estoppel may arise from the fact that the principal was silent when he ought to have declared his intention not to be bound by the agent's act, provided, as said above, his silence leads the party dealt with to alter his position for the worse. This is identical with the principles governing estoppel by acquiescence in instances not involving the relation of principal and agent. The question often arises directly between an agent and his principal in cases where the latter tries to hold the former responsible for acting without authority. In such litigation, if the principal does not promptly repudiate the transaction, but waits until doing so will cause loss to the agent, or until it appears that the transaction will cause loss, instead of profit, to himself, he will be estopped to deny responsibility. A class of cases which frequently present the matter for decision is where a broker or commission merchant has bought or sold property for a principal contrary to instructions. In such instances the principal is not permitted to remain silent after notice in order to watch the course of the market and determine whether he will adopt or repudiate the deal according as it may prove profitable or the reverse. Teasdale v. McPike, supra.

In the present case it is certain the advertising to November 20th was not done by plaintiff in reliance on defendant's failure to answer the letter of that date; and hence defendant's silence is not ground to estop it from denying liability for installments of rent which had accrued previously. In other words, the presumption that it ratified the contract Lurie made with plaintiff ought not to be raised merely from its silence when notified of the contract. But it is estopped to disclaim liability for the rent of the bulletin boards accruing subsequent to the date it had notice. Plaintiff requested a reply to its letter, and, in view of the fact that Lurie was conducting business in defendant's name, a reply should have been made. In commercial affairs prompt answers to such notifications are rather strictly insisted on by the law. Plaintiff supposed it had a contract with defendant and was furnishing the advertising service on that supposition. Hence the presumption is fair that, if defendant had repudiated the contract, plaintiff would have terminated the service at once. The advertising tended to increase defendant's sales, and was beneficial to it, as well as to Lurie. Therefore defendant was interested in its continuance. A case exactly like this as to the immediate point, and in which similar rulings were made, is Bryce v. Clark (Com. Pl.) 16 N. Y. Supp. 854. See, too, Cornelius v. Reiser (Com. Pl.) 18 N. Y. Supp. 113.

In view of certain facts established by the proof, we have doubted if defendant's omitting to answer plaintiff's letter requesting a payment on the rent due for advertising, was evidence for the jury on the question of an intentional ratification by defendant of the contract. In other words, whether the facts of the present case permit the application of the rule that the silence of a principal on receiving notice of an act done by his agent in excess of authority is evidence of ratification when the third party dealt with is not prejudiced by the principal's silence.[75] This point depends on whether the proof against an intentional ratification of the contract with plaintiff was so positive as to leave no room for the finding that it was ratified. It

[75] The limitations upon the doctrine that silence is evidence of ratification are elaborately discussed in Thompson v. Mfg. Co., 60 W. Va. 42, 53 S. E. 908, 6 L. R. A. (N. S.) 311 (1906), ante, p. 105.

The principle is well stated in Williams v. Merritt, 23 Ill. 573 (1860): "Long acquiescence in an act done by an agent beyond his powers, without objection at the time, and which may be inferred from the silence of the principal when informed of the facts, will amount to a conclusive presumption of the ratification of an unauthorized act, especially where such acquiescence is otherwise not to be accounted for, or such silence is either contrary to the duty of the principal, or has a tendency to mislead the agent and involve innocent parties. This is the doctrine where no agency in fact existed. Where an agency really existed, the presumption of the acquiescence of the principal is much stronger and more cogent. Story on Agency, §§ 255, 256; 1 Livermore on Agency, 44. But the reasons for this rule do not apply with equal force in favor of the agent himself who has wrongfully committed the unauthorized act." Silence which would really amount to an implied ratification as to a third person, might not amount to that in favor of the agent. This is the more true if inaction is due to assurances from the agent, or to an effort to avoid loss from the agent's act. Triggs v. Jones, 46 Minn. 277, 48 N. W. 1113 (1891).

is certain that defendant was chagrined when it learned Lurie had contracted in its name for the advertising, at once protested against the contract, and, because of it and other instances of unsatisfactory conduct, terminated business relations with him. But neither to Lurie nor the plaintiff did defendant declare an intention not to be bound by the agreement, and its attitude on that question was not made clear by anything it said or did, perhaps was not determined at once, but left open for further consideration and decision after legal advice was taken. It was at least equivocal so far as the record shows. As no conclusion on this point is compelled by the evidence, we hold the issue of intentional ratification was for the jury, and that defendant's silence was a fact relevant to that issue. If the defendant at any time purposely ratified the agreement, it could not disclaim liability thereafter. Andrews v. Ins. Co., 92 N. Y. 596; Brock v. Jones, 16 Tex. 461; 1 Parsons, Contracts (9th Ed.) p. 50, note (h). * * *

For failure to properly submit the case to the jury, the judgment was reversed and the cause remanded.

MOBILE & M. RY. CO. v. JAY.

(Supreme Court of Alabama, 1880. 65 Ala. 113.)

Action by Dr. Jay for surgical services in amputating the leg of one Richardson, who had been injured by the cars while in defendants' employ. Plaintiff was called by one O'Brien, a supervisor of defendants' road, who had no authority to employ him. Burnett, plaintiff's attorney, wrote the president of the road, Daniel Tyler, and Tyler's reply was, over the defendants' objection, admitted in evidence to show that he had knowledge of O'Brien's act and did not repudiate it. The letter said the writer had no knowledge of the plaintiff's claim, but when the superintendent of the road returned he would submit the matter to him. Judgment for plaintiff.

SOMERVILLE, J.' The letter of Daniel Tyler, president of the defendant railway company, was improperly admitted as evidence in the trial before the nisi prius court. It bears no date. It does not appear when it was written, nor when received. No evidence was offered to prove the contents of the letter of Burnett, to which it was a reply; nor was it proposed to make it relevant by any such extraneous evidence. Without the light of other facts, we are left in the dark as to whether or not it related to the subject-matter of this particular suit. Prima facie, therefore, the letter was irrelevant, and the objection to its admission should have been sustained.

The first charge given by the presiding judge to the jury does not embody an accurate exposition of the law of agency and ratification. The correct rule seems to be, that, where the principal has a full knowledge of the acts of his agent, from which he receives a direct

benefit, he must dissent, and give notice of his nonconcurrence, within a reasonable time, or his assent and ratification will be presumed. Brigham v. Peters, 1 Gray (Mass.) 147.

The first head-note in the case of Powell's Adm'r v. Henry, 27 Ala. 612, which holds, that, "if an agent exceeds his authority, although the principal may ratify the act; yet, to avoid it, he is not obliged to give notice that he repudiates it," is too comprehensive in its statement of the law. It is true that mere knowledge, on the part of the principal, of an agent's unauthorized action, will not make silence, or non-interference, in all cases amount to ratification. But it would, in those cases where the party dealing with the agent is misled or prejudiced (Smith v. Sheeley, 12 Wall. 358 [20 L. Ed. 430]); or where the usage of trade requires, or fair dealing demands, a prompt reply from the principal (Wharton on Agency, § 86). In all such cases, the principal, if dissatisfied with the act of the agent, and fully informed of what has been done, must express his dissatisfaction within a reasonable time. 2 Greenl. Ev. § 66.

The railway company received no direct benefit from the medical services rendered by Dr. Jay to one of its employés. The charge in question does not conform to the above principles, and the exception to it must be sustained.

It is unnecessary to consider the other points raised by the record. Reversed and remanded.[76]

[76] The cases often fail to distinguish between ratification by silence and estoppel. Cf. Owens Pottery Co. v. Turnbull Co., 75 Conn. 628, 54 Atl. 1122 (1903); Metcalf v. Williams, 144 Mass. 452, 11 N. E. 700 (1887); Hall v. Harper, 17 Ill. 82 (1855); Reid v. Alaska Packing Co., 47 Or. 215, 83 Pac. 139 (1905); Cooper v. Mulder, 74 Mich. 374, 41 N. W. 1084 (1889).

Where the principal neither does nor says anything upon being informed of the act of the alleged agent, he is bound, if at all, more properly upon the ground of estoppel. Thompson v. Mfg. Co., 60 W. Va. 42, 53 S. E. 908, 6 L. R. A. (N. S.) (1906), ante, p. 105; Pope v. Armsby Co., 111 Cal. 159, 43 Pac. 589 (1896). If there is no element of estoppel, mere silence does not amount to estoppel. California Bank v. Sayre, 85 Cal. 102, 24 Pac. 713 (1890).

In Bredin v. Du Barry, 14 Serg. & R. 30 (1825), Gibson, J., says that the disavowal by the principal must be prompt, at the moment the fact that the agent has transcended his authority comes to his knowledge. The circumstances may be such as to demand immediate action; but the better rule requires the dissent to be expressed within a reasonable time, under the circumstances of the particular case. Lyon v. Tams, 11 Ark. 189 (1850), citing Story on Agency.

It is sometimes said that ratification cannot be inferred from mere silence. Something more is required—an affirmative act. Hatton v. Stewart, 70 Tenn. (2 Lea) 233 (1879). This is certainly not the case in ratification by estoppel. See Saveland v. Green, 40 Wis. 431, 438 (1876), in which Lyon, J., puts the matter thus: "The rule as to what amounts to a ratification of an unauthorized act is elementary, and may be stated thus: When a person assumes in good faith to act as agent for another in a given transaction, but acts without authority, whether the relation of principal and agent does or does not exist between them, the person in whose behalf the act was done, upon being fully informed thereof, must within a reasonable time disaffirm the act, at least in cases where his silence might operate to the prejudice of innocent parties, or he will be held to have ratified such unauthorized act." Approved in Heyn v. O'Hagen, 60 Mich. 150, 26 N. W. 861 (1886). See, also, Robbins v. Blanding, 87 Minn. 246, 91 N. W. 844 (1902).

WHITLEY v. JAMES et al.

(Supreme Court of Georgia, 1904. 121 Ga. 521, 49 S. E. 600.)

Equitable petition for the recovery of certain land, removal of cloud, etc. The petition alleged that defendant James, as agent of Gen. Gordon to sell land for cash, had without authority sold on credit to corporations of which he was president. Plaintiff claimed under a quitclaim from Gen. Gordon, and makes James and all the corporations claiming under his deeds defendants. The court below sustained demurrers to the petition as to all the corporations. Plaintiff excepted.

LAMAR, J. [After stating the facts:] 1. The petition alleges that the unauthorized credit sale was made by the agent in 1889, that the deed was recorded in the same year, and that the defendant corporations had been in possession from that date until April, 1903, when the present suit was filed—a period of 14 years. If the original purchaser knew, or was charged with notice, that the agent was exceeding his authority in making a sale on credit instead of for cash, this would put the conveyance where it could be treated as void at the option of the principal. Civ. Code 1895, § 3021. Compare Loveless v. Fowler, 79 Ga. 135, 4 S. E. 103, 11 Am. St. Rep. 407; Lumpkin v. Wilson, 5 Heisk. (Tenn.) 555.

2. If, on the other hand, the sale is attacked because the agent of the vendor was also president or agent of the purchaser, the effect of the dual agency would authorize the principal to repudiate the transaction. Civ. Code 1895, § 3010; Red Cypress Lumber Co. v. Perry, 118 Ga. 876, 45 S. E. 674; Moore v. Casey, 116 Ga. 28, 42 S. E. 258; Story on Agency (8th Ed.) § 211.

3. But whether the attack is because of the dual agency, or of a violation of the instructions, the sale was not absolutely void, so as to be incapable of ratification. The agent actually had the power to sell. There was at least an attempted execution of the power, and the principal could waive the violation of instructions or the results of the inconsistent positions. The ratification, whether soon or late, was the equivalent of an original command, and cured any defect in the execution of the power. The ratification must, of course, be with knowledge of the material facts; nor would the principal be required to repudiate the act of his agent immediately upon the discovery that there had been anything which rendered the sale voidable. But if, after knowledge of what the agent had done, the principal made no objection for an unreasonable time, a ratification would result by operation of law.

What is a period long enough to bring about such a result would usually be a question for the jury, depending upon the peculiar circumstances of each case.[77] But in proceedings to recover the land and

[77] In Peck v. Ritchey, 66 Mo. 114 (1877), the court said that each case must be "governed by its own peculiar circumstances. Under some circumstances

set aside the deed the pleadings of the principal may themselves allege enough to show a ratification results as matter of law. In the analogous case of voidable sales to himself by an administrator, it has been held that failure to repudiate for seven years will raise the presumption that the owner acquiesces in the irregular and voidable sales. Advantage can be taken of such lapse of time by a demurrer. Civ. Code 1895, § 3775; Griffin v. Stephens, 119 Ga. 139, 46 S. E. 66, and citations. If there be a good and sufficient explanation as to why the principal did not know of the transaction, or had been unable to discover it, or if there be an excuse for delay in bringing the suit, these facts would have to be specially averred in order to prevent the defendant from taking advantage of the acquiescence implied by nonaction for a long lapse of time.

Whether, therefore, the statute of limitations be treated as a bar to the remedy, or raising a presumption of payment, the demurrer was properly sustained. The purchaser took possession in 1889. This was itself some notice, and, when followed by continued possession under a deed recorded for 14 years, with nothing to explain why the principal did not know, or could not learn by the exercise of ordinary care, of what had been done, the case was within, and not without, the rule. The period was long enough to raise the presumption of acquiescence in the act of the agent. Such acquiescence validated the deed. The validation conveyed the title completely to the purchaser. The claim for purchase money is barred, there being no averment of a written or sealed promise to pay the purchase price. Hays v. Callaway, 58 Ga. 288 (2).

These conclusions make it unnecessary to consider the effect of the recitals in the transfer or conveyance to Whitley. They are strengthened, however, by a consideration of the recital therein as to the "land sold by James." This itself goes far to indicate a ratification of the sale, but with a transfer of the principal's claim for what would be an accounting. But while the question was argued, the record does not present any question as to whether, under Civ. Code 1895, § 3079, this claim could be assigned, for James did not except to the judgment retaining him as a party defendant, and that dismissing the corporations was proper.

Judgment affirmed.

the act of the agent would bind the principal, if he did not immediately repudiate it, while other cases may be supposed where his silence for a week would not have that effect." See, also, Stearns v. Johnson, 19 Minn. 540 (Gil. 470) (1873).

KETCHEM v. MARSLAND.

(Supreme Court of New York, Appellate Term, First Department, 1896. 18 Misc. Rep. 450, 42 N. Y. Supp. 7.)

Action for the value of services as a dentist rendered by plaintiff to defendant's infant daughter at the request of one Mrs. Beecher, in whose custody the child had been temporarily placed by the parents.

BISCHOFF, J.[78] [After discussing the authority of such an agent to act for the parent in case of immediate needs of the child:] * * * Conceding, then, that Mrs. Beecher's act in requesting the plaintiff to perform the services in suit was in excess of her implied powers, yet, having the care of the child, she had some powers, as agent, to bind the defendant for actual necessaries; and, with this in mind, we proceed to the further question in the case, that of the defendant's ratification of this originally unauthorized act.

At the beginning of the year 1893 the plaintiff sent a bill to the defendant for these services, and received no answer, either in approval or dissent; and, during the ensuing three years, or more, up to the time of the commencement of this action, several communications of his to the defendant, with regard to his claim, met with no better response. Was not a ratification to be inferred from such silence?[79] Clearly, the answer must be in the affirmative. Mrs. Beecher was not a mere intermeddler, without shadow of right to bind the defendant, such as might have justified his ignoring a claim based upon her assumed agency in his behalf. She had been accorded the care and custody of his child, with certain implied duties to perform for the infant's well-being; and the procuring of certain necessaries, should circumstances require, was one of these duties.

Granted that the services performed by the plaintiff were not such as the defendant became liable for, in the first instance, through the agent's act merely, yet this was because the agent, being authorized to contract for some services, was not authorized as to these. She exceeded her actual powers, while clothed with some, and, but for the principal's subsequent assent, express or implied, he would not have been bound.

Under the circumstances of the case, the defendant's subsequent assent appeared from his failure to dissent during this extensive period succeeding his knowledge of the facts. He was bound to disavow Mrs. Beecher's act within a reasonable time after notice (1 Am. &

[78] Part of the opinion is omitted.

[79] The extent to which mere silence may be evidence of ratification, even of the act of a stranger, at least if he has in good faith assumed to act as agent, is fully discussed in Ladd v. Hildebrant, 27 Wis. 135, 9 Am. Rep. 445 (1870), citing at length from Woodward, J., in Philadelphia, W. & B. R. Co. v. Cowell, 28 Pa. 336, 70 Am. Dec. 128 (1857). See, also, Robbins v. Blanding, 87 Minn. 246, 91 N. W. 844 (1902).

Eng. Enc. Law [2d Ed.] 1203, and cases collated in note 2); and whether or not his delay was unreasonable was a question of fact (Id. 1205). "Where an agency actually exists, the mere acquiescence of the principal may well give rise to the presumption of an intentional ratification of the act." Story, Ag. § 256. "Where the relation of principal and agent does in fact exist, although in the particular transaction the agent has exceeded his authority, an intention to ratify will always be presumed from the silence of the principal who has received a letter informing him what has been done on his account." 1 Liverm. Ag. 50.

The author last quoted does not incline to the view that a ratification should be implied from a party's silence after notice of an act done on his account by a stranger who has totally assumed the agency, but adjudications are not wanting in support of it. "To say that silence is no evidence of it [ratification] is to say that there can be no implied ratification of an unauthorized act, or, at least, to tie up the possibility of ratification to the accident of prior relations. Neither reason nor authority justifies such a conclusion. A man who sees what has been done in his name and for his benefit, even by an intermeddler, has the same power to ratify and confirm it that he would have to make a similar contract for himself; and, if the power to ratify be conceded to him, the fact of ratification must be provable by the ordinary means." Railroad Co. v. Cowell, 28 Pa. 329, 70 Am. Dec. 128. "Whether silence operates as presumptive proof of ratification of the act of a mere volunteer must depend upon the particular circumstances of the case. If these circumstances are such that the inaction or silence of the party sought to be charged as principal would be likely to cause injury to the person giving credit to and relying upon such assumed agency, or to induce him to believe that such agency did in fact exist, and to act upon such belief to his detriment, then such silence or inaction may be considered as a ratification of the agency." Heyn v. O'Hagen, 60 Mich. 157, 26 N. W. 863. See, also, Saveland v. Green, 40 Wis. 438; Triggs v. Jones, 46 Minn. 277, 48 N. W. 1113; Kelly v. Phelps, 57 Wis. 425, 15 N. W. 385.

The rule as evolved by the adjudications is stated to be (1 Am. & Eng. Enc. Law [2d Ed.] 1209) that, "although the relation of the parties as principal and agent is an important consideration, yet, in the case of a mere stranger or volunteer, the silence of the alleged principal, when fully informed of the unauthorized act, is evidence of a ratification, though far less strong,"—citing Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 2 Colo. 248; Foster v. Rockwell, 104 Mass. 172; Harrod v. McDaniels, 126 Mass. 415; Ladd v. Hildebrant, 27 Wis. 135, 9 Am. Rep. 445.

In the case at bar we are not required to go so far as to decide that one may become bound, upon a failure to disavow within a reasonable time, for the act of a mere volunteer, assumed to be done in the former's

name, since here the ratification attaches to an existing agency which had been exceeded, and the reason upon which the rule as to implied ratification is founded may readily be found existent in this case.

Judgment affirmed, with costs.

(d) BY ENFORCING THE CONTRACT OR BRINGING SUIT

LA GRANDE NAT. BANK v. BLUM

(Supreme Court of Oregon, 1895. 27 Or. 215, 41 Pac. 659.)

Action on a promissory note, which plaintiff bank claimed was made by defendants in discharge of liability as indorsers of two notes of one Ramsey. The jury found that the cashier of the bank had agreed with defendant to accept the note in question to secure performance on Blum's part, either to collect and pay over the proceeds of the Ramsey notes, or, if unable to do that, to return the notes. Ramsey was insolvent, and Blum returned the notes uncollected. The bank now sues on the note made by Blum.

BEAN, C. J.[80] It is contended that the court erred in refusing to direct a verdict in favor of plaintiff, at the close of the testimony, on the ground that the evidence for the defendants showed that the agreement set up in the answer was made with the cashier of plaintiff without its authority. It is unnecessary for us to enter into an examination of the power, duty, and authority of the cashier of a bank, to ascertain whether the alleged agreement or contract set up in the answer was within the scope of his agency; for the plaintiff, by bringing this action on the note received by the cashier under such contract, has, so far as this proceeding is concerned, ratified the entire contract.

No rule of law is more fundamental than if the principal elects to ratify any part of the unauthorized act of an agent he must ratify the whole. He cannot accept that part which is favorable to himself, and repudiate the remainder. As said by Mr. Justice Story: "The principal cannot, of his own mere authority, ratify a transaction in part, and repudiate it as to the rest. He must either adopt the whole or none." Story, Ag. § 250. And "from this maxim," says Chief Justice Smith, "results a rule of universal application that, where a contract has been entered into by one man as agent of another, the person on whose behalf it has been made 'cannot take the benefit of it without bearing its burdens. The contract must be performed in its integrity.'" Rudasill v. Falls, 92 N. C. 222. Indeed, reason, as well as authority, is all one way on this question. Mech. Ag. § 130; Coleman v. Stark, 1 Or. 116; Eberts v. Selover, 44 Mich. 519, 7 N. W. 225, 38 Am. Rep. 278; McClure v. Briggs, 58 Vt. 82, 2 Atl. 583, 56 Am. Rep. 557.

Now, in this case, if the cashier of the bank exceeded his authority in making the contract with the defendants set up in the answer, and

[80] Part of the opinion is omitted.

in accepting the note in suit, the plaintiff was not bound thereby; but it was bound to take the contract in its entirety or not to recognize it at all. It cannot affirm that part of his act which is of advantage to it, and repudiate the rest. * * *

After ruling against plaintiff on certain matters of evidence and instructions by the trial court, the court affirmed the judgment for defendant.[81]

NICHOLS, SHEPHERD & CO. v. SHAFFER.

(Supreme Court of Michigan, 1886. 63 Mich. 599, 30 N. W. 383.)

Replevin. Plaintiff brings error. Affirmed.

CAMPBELL, C. J. Plaintiff brought this suit to replevy a 10 horse-power engine, with truck and other appendages, claiming to hold it under a chattel mortgage given in April, 1883, upon this property, and upon a 17 horse-power engine and a separator, to secure $1,390 in several installments. In July, 1884, one Adams, an agent of plaintiff, went to defendant to get the mortgaged property. Shaffer at that time gave him up all the other property, but desired to keep this engine. This was in fact left, and the rest taken away. At the same time a portable saw-mill was turned over to Adams, and included in a new chattel mortgage of the same conditions as the old one. All the other property, including this saw-mill, was sold under the mortgage security. No extension of time, or other legal consideration passed for the saw-mill mortgage. The whole dispute in the case arises upon whether this was merely an additional security, or whether the saw-mill was put in upon the consideration that the property now replevied should be released from the mortgage. The jury found for the defendant.

If defendant and his witnesses told the truth, and the jury evidently believed them, then there was no question but that the saw-mill was intended to be a substitute for the engine which was released. Upon this question the verdict is conclusive, if the other difficulties suggested do not stand in the way.

The principal contest is upon the authority of Mr. Adams. The court told the jury he had no authority to make the exchange, unless it was ratified, but left it to the jury to determine whether it was ratified or not. The several assignments of error all bear upon this question of ratification.

It appears from the record that one Worden, the collecting agent of plaintiff, went in October, 1884, to Shaffer, and wanted this en-

[81] But an action against the agent to hold him accountable for his wrongful acts against the principal is not necessarily a ratification of his acts, so as to affect a third person's liability to the principal. Barnsdall v. O'Day, 134 Fed. 828, 67 C. C. A. 278 (1905).

gine, and did not get it, and that Shaffer claimed it had been released; and this replevin suit was the sequel to this visit. It also appears that the saw-mill was sold on foreclosure, as well as the other property, and appropriated for the benefit of plaintiff. There was considerable testimony concerning the value of the various articles, and about the dealings of the parties, which had some bearing on the probabilities. We see no reason why it was not admissible, and we think it was also proper to show the profession and assumptions of authority of the various agents who appeared in the matter. These alone would not prove agency, and so the court held. But it was of the utmost importance to know on what understanding the saw-mill mortgage was given.

We have no doubt that the court was correct in its various instructions to the effect that plaintiff could not avail itself of the saw-mill mortgage, and repudiate the consideration for which it was made. Whatever may have been the authority of Adams to release the engine from the first mortgage, there can be no doubt that what he did and represented in obtaining the saw-mill mortgage bound the plaintiff, if plaintiff chose to keep and enforce that instrument. It thereby, at least, ratified his agency in taking it, and must be responsible for the manner in which it was obtained. Any other doctrine would lead to strange consequences. It could not demand or recover the property involved in this suit without restoring what was taken by its agent in lieu of it. Whether the corporate action had become irrevocable or not before Gordon's visit in October, 1884, full notice was given them, and its liability was thereafter fixed. No attempt has been made to restore Shaffer's rights. Plaintiff has put itself upon a denial of them, and the jury has found against its denials.

The issue is a very simple one, and does not call for much discussion. The judgment must be affirmed.

NYE v. SWAN.

(Supreme Court of Minnesota, 1892. 49 Minn. 431, 52 N. W. 39.)

MITCHELL, J.[82] This was an action to have deed from plaintiff to defendants, in form an absolute conveyance, declared a mortgage, and, as such, adjudged usurious and void, or, if the court should find it not void, that the plaintiff be allowed to redeem by paying the defendants the amount which the court should find due thereon. In their answer the defendants stood upon the ground that the deed was in fact, as it was in form, an absolute conveyance. The facts, as found by the court and jury, were as follows:

That in November, 1886, the plaintiff was the owner of the land in question; that at that time one White was the agent of the defend-

[82] Part of the opinion is omitted.

ants for the purpose of purchasing lands for them, and for no other purpose, and was furnished by them with money to pay for such lands as he might buy; that, assuming to act as the agent of defendants, he loaned $800 of this money to plaintiff under an agreement that it should be repaid within 100 days, with an additional $100 for the use of the $800 for that period of time, and at the same time as security for the loan took from plaintiff, and plaintiff executed, the deed in question to defendants, the consideration named in the instrument being $1,000. This deed was executed, not as an absolute sale and conveyance, but merely as security. White had no authority from defendants to lend money for them to any one. In the spring of 1887, defendants, having been informed that plaintiff claimed that the deed was given merely as a mortgage, inquired of White as to the facts, and were informed by him that plaintiff's claim was false; that he had made an absolute purchase of the land from him, and had never loaned him any money or taken the deed as a mortgage. Defendants, relying on White's statements, and believing them true, have always claimed that the deed was an absolute conveyance, and treated it as such, claiming that they were the owners of the land.

The court also found that White charged defendants $1,000 as the purchase price of the land, and that "the defendants allowed and paid the same to White before they, or either of them, had any notice or knowledge that the plaintiff made any claim that the deed was given as a mortgage or to secure a loan." This finding is probably not important, but the part of it quoted is unsupported by any evidence. There is the bare statement of one of the defendants that they paid $1,000 for the land, but not a particle of evidence as to when or how it was paid. So far as appears, White is still their agent, and his account as such unclosed, and, for anything that appears, the "payment" referred to might have been a mere matter of bookkeeping by White's charging defendants and crediting himself with $1,000.

Aside from this, we think that the findings were justified by the evidence. The only one, the correctness of which defendants' counsel seriously disputes, is the one to the effect that the deed was executed as security for a loan of money, and not as an absolute sale and conveyance of the land; and this contention, as we understand him, he makes, not upon the ground that the evidence was insufficient to justify a finding that the actual agreement between White and plaintiff was that the deed was to be merely security for the loan, but that inasmuch as White had no authority to make loans and take mortgages for defendants, but had authority to buy lands, and pay for them, and take absolute conveyances, therefore the deed was an absolute sale and conveyance of the land by plaintiff to defendants, and that the defendants have a right to retain and hold it as such. It would seem that to state such a proposition is to refute it. Plainly stated, it is that if an agent, intrusted with money to buy land for his principal, should, without authority, lend the money and take a mortgage as se-

curity, the principal would have a right to change it into such a contract as the agent was authorized to make, and hold it as an absolute conveyance of the land, although the other party never made any such contract.

The only legal principle which counsel invokes in support of his contention is the elementary one, that a person who deals with an agent is bound to inquire as to the nature and extent of his authority, and that the principal is only bound by the acts of the agent which are within the scope of his authority,—a rule the correctness of which no one will dispute, but which counsel has in this case wholly misapplied. He has overlooked the equally elementary rule that, where an agent has entered into an unauthorized contract in behalf of his principal, the latter cannot ratify a part of it, and repudiate the remainder, but must either adopt the whole or none, and, a fortiori, if he adopts it, he must adopt it as made, and not as something entirely different. There may be cases where the transaction includes several things which are severable and independent of each other, some of which are within and some beyond the authority of the agent, where the principal has the right to adopt the former and repudiate the latter. But in this case the transaction was an entirety, viz., a mortgage to secure a loan, and the defendants must either adopt it as a mortgage or repudiate it entirely.

The fact that the instrument was in form a deed of conveyance, such as White was authorized to take in the purchase of land, is wholly immaterial, at least in the absence of facts which would equitably estop plaintiff from denying that it was an absolute conveyance. No such state of facts exists here. It follows that the only rights, if any, which defendants have under the deed are those of mortgagees.

2. The plaintiff, however, claims that the defendants take it with the taint of usury; that they have ratified the act of White in exacting usury, by omitting to disavow the contract within a reasonable time after notice of plaintiff's claim, and by retaining the contract, and claiming title to the land under it. But they never recognized it as a mortgage, never treated the transaction as a loan, and have never received or claimed any usurious interest under it; but, on the contrary, have always believed and insisted that it was an absolute sale and conveyance of the land as it appeared on its face to be, and as their agent asserted that it was.

We fail to see wherein they have ratified the act of White in bargaining for a usurious rate of interest, or why, having failed in maintaining their claim that the deed was an absolute one, they are not entitled to have it stand as security for the amount of their funds actually loaned by White. Had they placed the money in White's hands, to be loaned at a legal rate of interest, and he had, without their authority or knowledge, exacted and included usurious interest, they could have enforced the mortgage for the amount actually loaned, and

lawful interest, and an attempt to do so would not have amounted to a ratification of the act of the agent in exacting usury. Jordan v. Humphrey, 31 Minn. 495, 18 N. W. 450. So here while, as the deed was executed as a mortgage, the defendants must adopt it, if at all, as a mortgage, yet their doing so, and availing themselves of it as security for the amount actually loaned, will not, of itself, amount to a ratification of the act of White in exacting usury. * * *

Because the court below refused to permit plaintiff to redeem and have a reconveyance upon payment of the loan, with interest, the cause was remanded, with directions to modify the judgment in accordance with this opinion, allowing the plaintiff to redeem within such reasonable time as the court may fix, and, upon his failure to do so within that time, that he be barred of all equity in the premises, and that the present deed stand and operate as an absolute conveyance.[83]

(e) LIMITATIONS

COOLEY v. PERRINE.

(Supreme Court of New Jersey, 1879. 41 N. J. Law, 322, 32 Am. Rep. 210.)

Suit upon a note for $75, given as part consideration on the sale of a horse to defendant. To this action defendant set up as a defense that the horse was warranted sound at the date of sale, and that he was not sound at that time. The horse was sold by one Woodward, an agent, who was not authorized by Cooley to make any representations or warranties, nor did Cooley in his lifetime, nor his executors, who brought this action, before the death of the horse, know of the representation made by Woodward. Upon exceptions to the instructions and for failure to instruct, plaintiffs brought certiorari.

DIXON, J.[84] [After holding that under the circumstances of this case Woodward had neither implied nor incidental authority to warrant the soundness of the horse:] * * * Sometimes it has been intimated that a distinction might be based upon whether the warranty by the agent were set up by a plaintiff to maintain a suit against the principal, or by a defendant to resist the principal's suit for the price, and that the attempt of the principal to collect the price, after he has learned of the warranty, is a ratification of it. On the idea that the authority does not cover the warranty, and that the purchaser is chargeable with knowledge of the authority, it is not plain how he can withstand the vendor's claim on a contract made, by alleging a contract

[83] See, also, Shoninger v. Peabody, 57 Conn. 42, 17 Atl. 278, 14 Am. St. Rep. 88 (1889); Id., 59 Conn. 588, 22 Atl. 437 (1890); Eberts v. Selover, 44 Mich. 519, 7 N. W. 225, 38 Am. Rep. 278 (1880); Henderhen v. Cook, 66 Barb. 21 (1866). But cf. Peters v. Ballistier, 20 Mass. (3 Pick.) 495 (1826); Gould v. Blodgett, 61 N. H. 115 (1881).

[84] Part of the opinion is on page 373.

which he knew was not made. But if there be anything at all in the distinction, it must be confined to those cases where, when the principal obtains knowledge of his agent's unauthorized warranty, the sale is in fieri, or can be declared void and the parties restored to their original position. What the principal does in pursuance of a bargain which he has authorized his agent to make, without knowledge that his agent has entered into an unwarranted contract, is not a ratification of such contract. Combs v. Scott, 12 Allen, 493; Smith v. Tracy, 36 N. Y. 79; Titus v. Phillips, 18 N. J. Eq. 541; Gulick v. Grover, 33 N. J. Law, 463, 97 Am. Dec. 728.

And if, when he acquires knowledge, he cannot, in justice to himself, disavow the whole of his agent's contracts, he is entitled to stand upon what he authorized, and repudiate the rest; the purchaser, who dealt with a special agent without noting the bounds of his power, must suffer rather than the innocent principal. Bryant v. Moore, 26 Me. 84, 45 Am. Dec. 96.[85]

[85] In a similar case the Maine court said: "But if he had received the goods without knowledge that they had been purchased at an advanced price, he would not be obliged to restore them, or pay such advanced price, if he could not, when informed of it, repudiate the bargain without suffering loss. In such case he would not be in fault. The seller would be, and he should bear the loss." Bryant v. Moore, 26 Me. 84, 45 Am. Dec. 96 (1846).

Enforcing a contract of loan which an agent had a right to make is not a ratification of his unlawful and unauthorized exaction of usury in making the loan. Estevez v. Purdy, 66 N. Y. 446 (1876). See, also, Bank of St. Mary's v. Calder, 3 Strob. 403 (1849).

See, also, Wyckoff, Seaman & Benedict v. Davis, ante, p. 86, and Wheeler v. Northwestern Sleigh Co. (C. C.) 39 Fed. 347 (1889). The receipt by a principal of the fruits of an unauthorized sale by an agent is not a ratification of such sale, even though the principal retains the money after learning of the true state of affairs, if it appears that the principal had no knowledge of the source of the money when it was received, and it was applied to settle an obligation of the agent which existed prior to the making of the unauthorized contract. Bohart v. Oberne, 36 Kan. 284, 13 Pac. 388 (1887). Money having no earmark does not stand on the same ground as chattels. Lime Rock Bank v. Plimpton, 17 Pick. 159, 28 Am. Dec. 286 (1835), post, p. 803; Thacher v. Pray, 113 Mass. 291, 18 Am. Rep. 480 (1873), supra, p. 117. As was said in a recent Missouri case: "Money is a current fund, which any one, without notice, has a right to receive in good faith in payment of a debt, without inquiry into the source from which it comes; and the person so receiving it cannot be compelled to restore it to him who was the true owner. Stephens v. Board of Education, 79 N. Y. 183, 35 Am. Rep. 511; Hatch v. Bank, 147 N. Y. 184, 41 N. E. 403; Justh v. Bank, 56 N. Y. 478; Smith v. Bank, 107 Iowa, 620, 78 N. W. 238. But it is said by plaintiff that defendant received and kept the money represented by the overdraft. That fact does not create a liability against defendant. If money due a principal from his agent is obtained by such agent by the unauthorized use of the principal's name, and paid over to the principal, who receives it in good faith, without notice, he is not liable to the party from whom the agent got the money. The fact that he keeps the money after being informed of how the agent obtained it is not a ratification. Thacher v. Pray, 113 Mass. 291, 18 Am. Rep. 480; Baldwin v. Burrows, 47 N. Y. 212; Gulick v. Grover, 33 N. J. Law, 463, 97 Am. Dec. 728; Bohart v. Oberne, 36 Kan. 284, 13 Pac. 388; Pennsylvania Co. v. Dandridge, 8 Gill & J. 323, 29 Am. Dec. 543; Lime Rock Bank v. Plimpton, 17 Pick. 159, 28 Am. Dec. 286." Case v. Hammond Packing Co., 105 Mo. App. 168, 79 S. W. 732 (1904).

To estop the principal to deny a ratification, it must appear that, at the time he accepted the proceeds of the sale, he knew the source of the money

These views are not at all in conflict with the class of cases which hold that the principal is responsible for the fraud or deceit of his agent, committed in the course of his employment, for his employer's benefit. Jeffrey v. Bigelow, 13 Wend. 518, 28 Am. Dec. 476; Sandford v. Handy, 23 Wend. 260; Barwick v. Eng. Joint Stock Bank, L. R. 2 Ex. 259; Mackay v. Com. Bank of N. Brunswick, L. R. 5 P. C. 394.

Those cases are well founded upon the principle that, as every man is bound to be honest in his dealings with others, so is he bound to employ honest agents, whether they be general or special, and if in transacting his business, and within the range of their authority, they be dishonest, the consequences are legally chargeable to the employer, and not to a stranger. Hern v. Nichols, 1 Salk. 289.

In the present suit, I think that the unauthorized warranty, inferred from the honest statement of the agent that the horse was all right, not communicated to the vendor or his representatives until after the horse was delivered to and had died in the possession of the vendee, formed no defence to the claim for the price, and that the appellee's prayer for instructions to the jury was justified by the facts and the law, and should have been granted. Its refusal was error, for which the judgment should be reversed, with costs.

The cause may be remitted to the Common Pleas for a new trial.

V. Effect of Ratification

(A) Retroactiveness

SOAMES v. SPENCER.

(Court of King's Bench, 1822. 1 Dowl. & R. 32, 24 Rev. Rep. 631.)

Assumpsit on a contract for the sale of ninety tons of oil per ship Naiad. Plea, the general issue, non-assumpsit. At the trial, before Abbott, C. J., at the Guildhall sittings, after last term, the plaintiff had a verdict.

The case was this: Messrs. Soames and Tennant, the plaintiffs, were jointly interested in part of the cargo of the ship Naiad. Before the arrival of the vessel, Soames, without the knowledge or authority of Tennant, sold the oil in question, in which they were jointly inter-

he received, or that when he learned the facts he failed to repudiate the unauthorized contract of the agent. Holm v. Bennett, 43 Neb. 808, 62 N. W. 194 (1895).

And the receipt from the agent of a chattel which belonged to the principal before it was procured by an unauthorized act of the agent, of which the principal was ignorant when he so received it, is no ratification of the agent's act, even though the principal retains his chattel after he learns the facts. Union Gold Mining Co. v. Rocky Mountain Nat. Bank, 1 Colo. 531 (1872); Baldwin Fertilizer Co. v. Thompson, 106 Ga. 480, 32 S. E. 591 (1898).

ested, to the defendants, through the medium of Lintot, a broker. The only evidence of the contract was the broker's note, signed by the broker, but Tennant was not named in the note. Some time after this, Tennant, hearing of the contract, wrote to the defendants, apprizing them that he was jointly interested in the oil with Soames, that the contract had been entered into without his knowledge or authority, and that he considered himself released from, and would not be bound by it. A communication then took place between the defendants and Tennant, who endeavored to prevail upon them to release him from the contract, but they declined, saying they would hold him and the other plaintiff to it. In consequence of this intimation, Tennant acquiesced, and said, the oil "then must be delivered." All this took place in the month of September, 1819, before the vessel arrived, each party considering himself bound by the contract. The vessel arrived in January, 1820, and then Lintot, the broker, waited on the plaintiffs with samples. He saw one of the defendants, to whom the samples were delivered, and by him accepted. The broker asked him if he was inclined to take the remainder of the plaintiff's share of the Naiad's cargo, but he declined. The prompt would expire on the 12th of February, and six or seven days before then, the defendants refused to be bound by the contract. The learned Judge charged the jury, under these circumstances, that the plaintiffs were entitled to recover, and they had a verdict accordingly, with liberty to the defendants to move to enter a nonsuit if the Court should be of opinion, that the contract declared upon was not binding.

ABBOTT, C. J. I am of opinion, that the verdict in this case was right. The case turns upon the question, whether the original contract was ratified by Tennant. He was no party to it at first, and, in fact, afterwards repudiated it, but in the result he assents to it, and says—"then the oil must be delivered." It is then understood by all parties that it is to be a binding contract. This is in the month of September. In January the oil arrives, and then the defendants, acting upon the contract, take samples, and it is not until the very last moment, when the prompt is about to expire, that they make any objection. The jury asked me, whether, in point of law, they might find a verdict for the plaintiffs. I said, that in my opinion, a subsequent ratification of a contract is equivalent to a prior authority; and I told them, that if they thought Tennant did ratify the contract, and that with the knowledge of the defendants, and they acceded to it, it was too late for them to say, at any after time, that they were not bound by the contract. That is the way I left the case to the jury. They found for the plaintiffs, and I think they came to a just conclusion.

BAYLEY, J. I am of the same opinion. The broker's note is, within the statute of frauds, evidence of a written contract. The original authority to sell need not be in writing, and if Tennant subsequently ratified the contract entered into by assenting to it, it became a binding contract.

HOLROYD, J. In this case, according to the evidence, there was a subsequent ratification by Tennant of the original contract, and, I think, that is sufficient to give it validity though originally made without his authority. His subsequent ratification amounts to an original authority; and the maxim of the law is: "Omne actum ab agentis intentione est judicandum."

Rule refused.

MACLEAN v. DUNN.

(Court of Common Pleas, 1828. 4 Bingham, 722, 13 E. C. L. 712.)

One Ebsworth, a London wool broker, sold for the account of plaintiff Russian and German wool to defendant, and in turn bought from defendants for plaintiff Spanish wool, giving bought and sold notes therefor. The notes were not signed by Dunn, but there was evidence that he afterwards orally ratified the act of the other defendant, Watkins, in authorizing Ebsworth to make the contract. Maclean now brings special assumpsit for not accepting and paying for the Russian and German wool. Verdict for plaintiff and defendant obtained a rule nisi to enter a non-suit or have a new trial.

BEST, C. J.[86] It has been argued, that the subsequent adoption of the contract by Dunn will not take this case out of the operation of the statute of frauds; and it has been insisted, that the agent should have his authority at the time the contract is entered into. If such had been the intention of the legislature, it would have been expressed more clearly; but the statute only requires some note or memorandum in writing, to be signed by the party to be charged, or his agent thereunto lawfully authorized; leaving us to the rules of common law, as to the mode in which the agent is to receive his authority. Now, in all other cases, a subsequent sanction is considered the same thing in effect as assent at the time. "Omnis ratihabitio retrotrahitur et mandato æquiparatur." And in my opinion, the subsequent sanction of a contract signed by an agent, takes it out of the operation of the statute more satisfactorily than an authority given beforehand. Where the authority is given beforehand, the party must trust to his agent; if it be given subsequently to the contract, the party knows that all has been done according to his wishes. But in Kinnitz v. Surry, where the broker, who signed the broker's note upon a sale of corn, was the seller's agent, Lord Ellenborough held, that if the buyer acted upon the note, that was such an adoption of his agency as made his note sufficient within the statute of frauds; and in Soames v. Spencer, 1 Dow. & Ry. 32, where A. and B., being jointly interested in a quantity of oil, A. entered into a contract for the sale of it, without the authority or knowledge of B., who, upon receiving information of the circum-

[86] Part of the opinion is omitted.

stance, refused to be bound, but afterwards assented by parol, and samples were delivered to the vendees, it was held, in an action against the vendees, that B.'s subsequent ratification of the contract rendered it binding, and that it was to be considered as a contract in writing within the statute of frauds. That is an express decision on the point, that under the statute of frauds the ratification of the principal relates back to the time when the agent made the contract. * * *

Rule discharged.

TOWN OF ANSONIA v. COOPER.

(Supreme Court of Errors of Connecticut, 1894. 64 Conn. 536, 30 Atl. 760.)

Interpleader among the claimants of a fund paid into court by the town of Ansonia for land taken for a school site. To the answer and claim of Henry Alling, Elizabeth Downs demurred, and the court sustained the demurrer. Chas. Cooper had owned the land. On his death he left it to his widow for life. She sold the fee and gave a warranty deed under which Alling claimed. On her death her four sons divided the unused balance of the purchase price and the other personal property left by their father, under a verbal agreement to accept such amounts as complete distribution and settlement of their claims under his will. Three sons quitclaimed to Alling. The fourth son, Alfred Cooper, after the beginning of these proceedings, assigned his claims to Elizabeth Downs.

ANDREWS, C. J.[87] * * * The said Alfred Cooper knew when he made said agreement and received said money that the amount he received under and pursuant to the said agreement was the money which the said Elizabeth Cooper received from the sale of the said real estate conveyed by her, the said Elizabeth Cooper, as aforesaid, and he had full knowledge that the said real estate had been sold and conveyed by full warranty deed, and that the said Henry G. Alling was then in the possession of said land, claiming title thereto by virtue of the deed which had been given by the said Elizabeth Cooper as aforesaid.

These facts, being admitted by the demurrer, must, for the purposes of the present discussion, be taken as proved and found by the court. Charles Cooper, William Cooper, and Henry Cooper may be laid out of the case. They have each released to Mr. Alling. The rights of Elizabeth Downs are just the same as, and no greater than, the rights of Alfred Cooper. Her assignment from him was since the commencement of the condemnation proceedings.

Before the Superior Court, the parties seemed to have discussed only the question of estoppel. The court, in its memorandum of decision, placed its conclusion on the ground that there was no estoppel. The

[87] Part of the opinion is omitted.

briefs in this court are largely made up of the same discussion. If that was the only question in the case, we might be led to agree with the Superior Court. But estoppel is not the doctrine of the case. There is another ground clearly set forth in the answer of Mr. Alling, on which it seems to us the answer should have been held sufficient, and the demurrer overruled. And that ground is that Alfred Cooper has ratified the sale of his land made by his mother. The language of the answer is explicit: That Alfred Cooper and his brothers received said sum of money in lieu and in place of the real estate which had been devised to them by their father, but had been sold by their mother, and said parties intended, by the division of said money among them, to ratify and confirm the sale of said real estate by the said Elizabeth Cooper. And the said Alfred Cooper knew when he received said money that the amount which he received was the money which the said Elizabeth Cooper had received from the sale of the said real estate, and he had full knowledge that the said real estate had been sold and conveyed by a full warranty deed.

This is, then, the condition of things: Mrs. Elizabeth Cooper, without authority to do so, sold and undertook to convey land which belonged to Alfred Cooper. She received the full value of the land in money. Her grantee entered into possession of the land conveyed, and claims to have a complete title thereto. Alfred Cooper, knowing all these facts, and intending to ratify and confirm the sale of his said land, has received that money and applied it to his own use, and still keeps it. Ratification means the adoption by a person, as binding upon himself, of an act done in such relations that he may claim it as done for his benefit, although done under such circumstances as would not bind him, except for his subsequent assent, as where an act was done by a stranger having at the time no authority to act as his agent, or by an agent not having adequate authority. The acceptance of the results of the act with an intent to ratify, and with full knowledge of all the material circumstances, is a ratification. Ratification makes the contract, in all respects, what it would have been if the requisite power had existed when it was entered into. It relates back to the execution of the contract, and renders it obligatory from the outset.[88] The party ratifying becomes a party to the contract, and is, on the one hand, entitled to all its benefits, and on the other, is bound by its terms. Negley v. Lindsay, 67 Pa. 217, 5 Am. Rep. 427; Edwards v. Railroad Co., 1 Mylne & C. 650–672; And. Law Dict. in verb.; Stanton v. Railroad Co., 59 Conn. 285, 22 Atl. 300, 21 Am. St. Rep. 110.

[88] See, also, Johnson v. Smith, 21 Conn. 627 (1852), quoting from Story on Agency, § 244, and Grant v. Beard, 50 N. H. 129 (1870), ante, p. 125.

"Subsequent ratification has a retrospective effect, and is equivalent to a prior command. To say that an agent entered into a contract without authority from his principal, and that the principal subsequently ratified such contract, is in legal intendment and effect the equivalent of saying the agent was duly authorized to make the contract. Kraft v. Wilson, 104 Cal. xvii, 37 Pac. 790 (1894).

Alfred Cooper, having ratified the sale of his land by his mother, and now, through his assignee, seeking to obtain the money in the hands of this court, is in the position of one who has verbally contracted to convey his land to another, has put that other into possession, has received his pay in full in money, and, while keeping the money, is trying to get the price of his land the second time. It needs no argument—or, rather, the statement of the case is the strongest possible argument—to show that he ought not to succeed. And, as he cannot succeed, so also his assignee, Elizabeth Downs, cannot. There is error. The demurrer should be overruled.

The judgment sustaining the demurrer is reversed. The other judges concurred.

SHUENFELDT v. JUNKERMANN.

(Circuit Court of the United States, Northern District of Iowa, 1884. 20 F. 357.)

SHIRAS, J. On the trial of this cause before a jury, it appeared that the plaintiffs were wholesale liquor dealers, residing and doing business in Chicago, Illinois, and the defendants were druggists, residing and doing business in Dubuque, Iowa. The action was based upon acceptances of defendants, and upon an open account. The defendants pleaded that the acceptances, as well as the account, were for intoxicating liquors sold in violation of the statute of Iowa, commonly known as the prohibitory liquor law. On the part of the defendants it was claimed that the liquors were sold in pursuance of a contract entered into between one Connors, an agent of plaintiffs, and the defendants, at Dubuque, Iowa, by which it was agreed that plaintiffs were to furnish to defendants, from time to time, various kinds of liquors at certain prices, and put up in packages to suit the market. On the part of plaintiffs it was denied that Connors made any such agreement, and, further, that if he did he had no authority to make any contract for plaintiffs, he being merely a traveling agent, with power to solicit trade and orders, which were to be forwarded to Chicago for approval or disapproval by plaintiffs. The evidence showed that the liquors were furnished by plaintiffs upon the orders of defendants, two of which were given to Connors in person when at Dubuque, and the others were by letters directed to plaintiffs, the goods being delivered to the railroad company at Chicago.

The court instructed the jury that if the agent, Connors, had authority to make a completed contract of sale, and did in fact make a contract at Dubuque, under which the liquors in question were furnished, then the sale was a violation of the statute of Iowa, it not being questioned that the liquors were intoxicating, and intended to be used as a beverage. See Second Nat. Bank v. Curren, 36 Iowa, 555;

Taylor v. Pickett, 52 Iowa, 467, 3 N. W. 514. The jury was further instructed that if the agent, Connors, merely procured or arranged for the forwarding of orders from time to time by defendants, which orders, when received by plaintiffs, were subject to their approval or disapproval, and which they were under no obligation to fill unless approved, then the sale would be deemed to be a sale made in Illinois. See Tegler v. Shipman, 33 Iowa, 194, 11 Am. Rep. 118. The court also ruled that if Connors, not having authority to make a completed contract of sale on behalf of plaintiffs, nevertheless did in form enter into a contract at Dubuque with defendants, whereby he assumed to bind plaintiffs for the future delivery of liquors in quantities to be fixed by defendants, which contract was not binding upon plaintiffs by reason of the want of authority on the part of Connors, and the plaintiffs approved or ratified the contract by forwarding the goods from time to time to defendants as ordered by them, the act of affirmance which gave binding force to the contract being done in Chicago, the contract will be deemed to be made in Chicago, and being valid there would be enforced in Iowa, unless it was shown that the sale was made with intent to enable defendants to violate the laws of Iowa.

The jury found a verdict for plaintiffs, and defendants move for a new trial, on the ground that there was error in the ruling of the court upon the last point named.

On the part of the defendants it is claimed that the act of ratification has relation back to the time, place, and circumstance when and where the terms of the proposed contract were arranged between the agent and the defendants, and supplied the authority then wanting, thereby rendering the contract as binding as though the agent originally possessed the authority to make it. In support of this proposition, counsel cite the cases of Beidman v. Goodell, 56 Iowa, 592, 9 N. W. 900; Eadie v. Ashbaugh, 44 Iowa, 519; Lowry v. Harris, 12 Minn. 255 (Gil. 166); Hankins v. Baker, 46 N. Y. 670; Moss v. Rossie Lead Co., 5 Hill, 137; Forsyth v. Day, 46 Me. 176; and Story, Ag. § 244,—all of which recognize and enforce the general rule as given by Story, that: "A ratification, also, when fairly made, will have the same effect as an original authority has, to bind a principal, not only in regard to the agent himself, but in regard to third persons. * * * In short, the act is treated throughout as if it were originally authorized by the principal, for the ratification relates back to the time of the inception of the transaction, and has a complete retroactive efficacy." [89]

That this is the general and the correct rule to be applied to cases requiring the construction and application of the contract to its subject-matter, for the purpose of ascertaining and protecting the rights of the parties thereto, cannot be questioned, as it is sustained by authorities without number; but the point now presented is whether this

[89] Upon ratification the principal takes the contract as it was made, not as it might have been or ought to have been made. Drennan's Adm'r v. Walker, 21 Ark. 539 (1860); Johnson v. Hoover, 72 Ind. 395 (1880).

rule is properly applicable to the question involved in the instruction given to the jury and excepted to by defendants. In the case at bar the court is not called upon to determine the rights of the parties as defined by the terms of the contract itself. The defendants are not asserting, as against the plaintiffs, any rights or benefits conferred upon them by the express provisions of the contract itself. On the contrary, their defense is that the contract is not binding upon them, and never took effect, because it is, as they allege, illegal and void, in that it was made in Iowa in violation of the statutes of this state.

The defendants, having received all the benefits conferred upon them by the contract, are now seeking to defeat its enforcement, not upon any question arising on the terms of the contract, but upon the ground that, at the time and place the contract was made, it was invalid and void. Upon such an issue, is there any reason why the court shall not ascertain the very facts of the case and decide accordingly? Is there any reason why the plaintiffs are estopped from proving the exact truth of the transaction? The point of inquiry is, when and where was the contract of sale entered into? "A contract is an agreement in which a party undertakes to do, or not to do, a particular thing." Sturges v. Crowninshield, 4 Wheat. 197, 4 L. Ed. 529. A contract does not become such until the minds of the contracting parties meet.

When and where did the plaintiffs agree to sell the liquors in question to the defendants? Connors certainly did not make or complete a contract with defendants, for it is admitted, in the aspect of the case now under consideration, that he had no authority to make a contract or to bind plaintiffs. The utmost that can be said is that he, not having authority to make a contract, undertook to agree upon the terms of sale, which did not, however, bind plaintiffs until they had given their assent thereto. The contract was made when plaintiffs, by approval, acceptance, or ratification, assented thereto. Then, in fact, for the first time, did the minds of the contracting parties meet, and thereby render binding and obligatory that which before was, in effect, only a proposition for a contract. The rule is well settled that where orders are given for the purchase of goods to an agent who has not authority to sell, but which are forwarded to the principal for his approval, the contract is deemed to be made at the place of approval. Tegler v. Shipman, 33 Iowa, 194, 11 Am. Rep. 118; Taylor v. Pickett, 52 Iowa, 469, 3 N. W. 514. The principle recognized in these cases is applicable to the question presented in the case under consideration, and no good reason is perceived for making a distinction in the rule to be applied.

The same doctrine is enforced in cases of contracts entered into on Sunday, where, by the law of the state, such a contract would be void. A ratification thereof on a week-day is held good. Thus, in Harrison v. Colton, 31 Iowa, 16, the supreme court of Iowa cite approvingly the rule given in Story, Cont. § 619, "that any ratification of a contract

on a week-day, such as a new promise to pay, a refusal to rescind on demand made, a partial payment, and the like, would render the contract binding, though originally made on Sunday." If the ratification of a contract must, under all circumstances, be held to revert back to the time and place of its inception, and only that effect can be given to it, it would follow that a Sunday contract could not be ratified on a week-day, because, if that were the rule, the ratification must be held to have taken effect at the time the original contract was entered into, and a ratification taking effect on Sunday would be open to the same objection that invalidated the original contract. The ratification is held good, however, because it takes effect on a week-day, and the courts recognize that fact, and, in consequence thereof, give effect to the contract originally void.

The true rule is that when the question involves the validity of the contract, as such, the court may consider the very time and place where and when the act was done that gave life to the contract. In the case at bar this act took place in Chicago, and the contract must be held to have been made at that place, and not in Dubuque. Consequently, there was no error in the instructions given to the jury upon this point, and the motion for new trial must be overruled.

GRAHAM v. WILLIAMS.

(Supreme Court of Georgia, 1901. 114 Ga. 716, 40 S. E. 790.)

SIMMONS, C. J. An equitable petition was filed by Graham against Williams and others. It alleged that he had title to a certain lot of land in Appling county, and that the defendants, claiming the land under some pretended title which they had failed to record, had entered upon the land, and committed trespass by cutting timber and boxing the trees for turpentine. The petition set out a chain of title, and alleged that the plaintiff and defendants claimed under a named common grantor. The defendants admitted that they claimed under the common grantor named in the petition, and alleged that they had title to the land. The petition alleged that the plaintiff's immediate grantor was one Einstein, who conveyed the land to plaintiff in 1892. The plaintiff prayed for an injunction to restrain the defendants from committing any further trespass, for a cancellation of the defendants' deeds, and for damages for the trespass.

At the trial of the case he introduced in evidence deeds commencing with that from the common grantor, and closed his evidence with a deed purporting to have been made by an attorney in fact of Einstein, plaintiff's immediate grantor, and a deed from Einstein himself to the plaintiff, made and executed after the commencement of the suit. In this last deed Einstein, after reciting, in substance, that the power of attorney given his attorney in fact was not sufficiently comprehensive

in its terms to authorize the attorney in fact to sell and convey this tract of land fully ratified and confirmed the deed made by the said attorney, and conveyed the land to Graham. The record does not disclose that Graham was, or ever had been, in possession of the land. At the close of the plaintiff's evidence the court, on motion, granted a nonsuit upon the ground that the evidence showed that at the commencement of the action by the plaintiff he did not have sufficient title to authorize a recovery. Graham excepted, and brought the case here for review.

1. Under the above facts the sole question to be determined is whether the deed of ratification made by Einstein after the commencement of the suit related back to the execution of the deed by the attorney in fact, so as to authorize the plaintiff to recover against the defendants. It was contended in the brief of counsel for the plaintiff in error that the ratification by Einstein of the act of his agent related back to the time of the execution and delivery of the agent's deed to the plaintiff, although the power of attorney given the agent did not authorize him to convey this land. There is no doubt that the contention of the plaintiff's counsel embodies a rule which is generally true. Generally the ratification of an unauthorized act by an agent relates back and becomes the act of the principal as of the time when the unauthorized act was performed. While this is generally true, there is an exception to the rule, which is that such a ratification does not so relate back as to affect the rights of other parties which have intervened and accrued between the time of the unauthorized act and that of the ratification. Mechem, Ag. § 168; Story, Ag. (9th Ed.) § 245; Whart. Ag. § 77; Evans v. Coleman, 101 Ga. 152, 28 S. E. 645. These authorities, and the decisions which they cite, all hold that, when rights of third parties have intervened between the unauthorized act and its ratification, the latter does not relate back so as to affect those rights. If such were not the rule, Einstein might have conveyed this land to a third person subsequently to the unauthorized deed by his agent, and thereafter, by ratifying and confirming the agent's act, defeated the rights of the person to whom he had himself conveyed the land.

2. Having established that there is an exception of this nature to the general rule, it remains only to determine whether the defendants had in the present case acquired such rights as would come within the exception. In the first place, it is a well-established rule that a plaintiff must recover upon facts as they existed at the time of the commencement of the action. Those facts constitute his cause of action. If new and additional facts arise after the commencement of the suit, he cannot rely upon them as ground for a recovery. If the facts upon which his suit is predicated are insufficient to authorize a recovery by him, the defendants have a legal right to ask the court for a nonsuit, and, under the law, the court would be compelled to grant it. In the present case the plaintiff virtually admitted, by putting in evidence the deed of ratification, that his title was not sufficient, at the time suit

was brought, to have sustained a recovery; for the deed of ratification states, in substance, that the power of attorney made by Einstein to his agent was not broad enough to authorize the agent to convey the land. The defendants had the right, under the facts as they stood at the time suit was commenced, to have a nonsuit. They had the right to have the case tried upon the facts as they existed at the time of the commencement of the suit. The plaintiff had no right to interject what might be called a new party, Einstein, and a new title originating after the commencement of the suit.

In the case of Wittenbrock v. Bellmer, 57 Cal. 12, it appeared that the president of a building and loan association had, without authority, transferred a note and mortgage to Wittenbrock, who commenced proceedings to foreclose the mortgage. After the action had been pending for several months, the trustees of the association ratified the previous action of its president in the premises. The court said: "We are unable to discover any principle upon which the defendant's rights could be affected by such ratification. Conceding that at the date of the commencement of the action the plaintiff had no cause of action, it does not seem to us that he could maintain the action upon a cause of action subsequently acquired against the defendant. The case was at issue, and, if it had been tried at any time prior to the date of the ratification, the judgment must have been for the defendant. Could a stranger to the action step in at any time before the trial, and deprive the defendant of that right by placing in the hands of his adversary an instrument upon which he might have maintained an action, or one which he alleged that he had, but in fact did not have, when he commenced the action? Clearly not. If a party has no cause of action at the time of the institution of his action, he cannot maintain it by filing a supplemental complaint founded upon matters which have subsequently occurred." Similar rulings were made by the same court in Taylor v. Robinson, 14 Cal. 396, and McCracken v. City of San Francisco, 16 Cal. 624. In 61 Am. Dec. 88, Mr. Freeman, in his notes to Persons v. McKibben, 5 Ind. 261, in which the ruling was contrary to that made in Wittenbrock v. Bellmer, cites the latter case, and says that "the ruling of the California case * * * is the better decision."

The same view of the law was taken by the supreme court of the United States in Parmelee v. Simpson, 5 Wall. 86, 18 L. Ed. 542, and in Cook v. Tullis, 18 Wall. 338, 21 L. Ed. 933. In the latter case Wittenbrock v. Bellmer is cited with approval. In the notes to Atlee v. Bartholomew (Wis.) 5 Am. St. Rep. 103, 114 (s. c. 69 Wis. 43, 33 N. W. 110), it was said: "As a general rule, if a party has a complete cause of action or defense when a suit is commenced, he cannot be deprived thereof, pendente lite, by his adversary, or some other party, ratifying some act or contract which at the commencement of the action was without any binding force for want of such ratifica-

tion." See, also, Pollock v. Cohen, 32 Ohio St. 514; Fiske v. Holmes, 41 Me. 441; Wood v. McCain, 7 Ala. 806, 42 Am. Dec. 612.

Having shown that ratification does not so relate back as to affect the intervening rights of third persons, and that these defendants acquired rights before the ratification pendente lite, we are of opinion that the judge did not err in granting a nonsuit.[90] Judgment affirmed. All the Justices concurring.

(B) Revocability

PERRY v. HUDSON.

(Supreme Court of Georgia, 1851. 10 Ga. 362.)

Action by Oliver H. Perry to recover money paid as security for defendant under judgment in Wilcox county, Alabama. Plea, general issue and payment. Verdict for defendant. The court refused a new trial. Plaintiff excepted and now assigns these exceptions for error.

WARNER, J. The plaintiff in error insists upon two of the grounds only, taken in the bill of exceptions, and our judgment will be restricted thereto.

[1.] First, that the Court erred in admitting the evidence of Theresa Killabren, a witness offered by the defendant. It appears from the record, that Melton, as the agent of Hudson, the defendant, went to the state of Alabama, and instituted three actions of trover in the name of Hudson, to recover sundry slaves. Being a non-resident, he was required to give security for the costs of the respective suits, and the plaintiff became his security; the suits were instituted in the name of Hudson; were subsequently dismissed, and the costs thereof paid by Perry, who now brings suit against Hudson, to recover the amount of costs so paid.

It appears that after the suits had been instituted by Melton, as the agent of Hudson, in the name of the latter, he went to Alabama, assisted in the prosecution of the suits, and continued the same twice on his affidavit. The continuance of the causes on the affidavit of Hudson, the plaintiff therein, is not only shewn by the records of the Court in which the suits were pending, but is also shewn by the testimony of James T. Johnson, Esq., the attorney, who conducted the suits.

Here, then, we have the most conclusive evidence that Hudson ratified the act of his agent in instituting the suits, whatever may have been the original authority delegated to him, and by such ratification made the act his own, and bound him as a party plaintiff, for the legal results of the suits thus instituted. 1 Livermore on Agency, 44. When the principal adopts the acts of his agent, such adoptive authority

[90] See especially Wood v. McCain, Taylor v. Robinson, and Pollock v. Cohen, cited supra.

relates back to the time of the transaction, and is deemed in law the same to all purposes, as if it had been given before. Lawrence v. Taylor, 5 Hill, 113.

The acts of ratification of the authority of Melton to institute the suits by Hudson, were not controverted at the trial; indeed, the fact that he continued the causes twice on his affidavit, appeared of record. Upon this state of facts, Hudson attempted to shew that the suits were instituted in Alabama, by Melton, his agent, without his authority, and therefore he was not liable to pay the costs of the same, and for that purpose the testimony of Killabren was introduced. This evidence was inadmissible, in our judgment, to destroy the effect of his own conduct, ratifying the institution of the suits as before stated, by proving the private understanding between himself and Melton in relation to the suits, prior to the time it was shewn he had ratified the institution of them by continuing them, and aiding and assisting in their prosecution. The suits were instituted in his name, and if done without his authority, why did he not dismiss them? Why did he continue them twice, and aid in the prosecution of them?

[2.] Chancellor Kent states the true doctrine in relation to this question, when he says: "It is a very clear and salutary rule in relation to agencies, that where the principal, with knowledge of all the facts, adopts or acquiesces in the acts done under an assumed agency, he cannot be heard afterwards, to impeach them, under the pretence that they were done without authority, or even contrary to instructions." 2 Kent's Com. 616. The defendant having ratified the institution of the suits in Alabama, after a full knowledge that the same had been done by Melton, in his name, he cannot now be heard, to repudiate the act, under the pretence that the suits were instituted without his authority, or contrary to his instructions.

The second objection is to the latter part of the charge of the Court to the jury.

[3.] The Court in the first part of its charge to the jury, stated the principles of the law applicable to the case before it, with clearness and precision. But in that portion of its charge, in which it instructed the jury "that if they believed that Hudson did not order the suits, nor subsequently adopt them, but that by an agreement with Melton, permitted Melton to use his name only, at Melton's own costs, then, they should find for the defendant," we think there is error.

There is not a particle of evidence in the record, that we can discover, going to shew that Hudson did not adopt and ratify the act of Melton in instituting the suits, but on the contrary, the evidence is, that he did adopt and ratify the institution of them, by continuing them twice on his own affidavit, and assist in the direction and prosecution of them. This evidence of the plaintiff was not impeached or controverted in any manner whatever, as we can find in the record; consequently, it was error to instruct the jury in regard to an assumed state of facts which did not exist; for there was no evidence before

them, which would authorize the belief that Hudson did not subsequently adopt and ratify the suits, after they had been instituted in the name of Melton; but the whole of the evidence in relation to that point, was the other way, and this was the controlling question in the case. The whole of the latter part of the charge, in our judgment, destroyed the legal effect of the first portion of the charge, which stated the law correctly, and was based upon the evidence of the adoption and ratification of the suits by the defendant. In Paschal v. Davis, 3 Ga. 256, we held it to be error in the Court to charge the jury upon an assumed state of facts, which had not been proved, and have re-affirmed that principle in subsequent cases.

Let the judgment of the Court below be reversed.

COFFIN v. GEPHART.

(Supreme Court of Iowa, 1865. 18 Iowa, 256.)

Replevin for a bull. The animal was left by his owner, the plaintiff, with his tenant, who, after treating him as his own for some time, sold him to defendant. Verdict for plaintiff, and defendant appeals.

COLE, J.[91] I. There appears to have been no controversy between the parties, as to the former ownership of the property by the plaintiff; but the defendants claim that plaintiff, after a full knowledge of the sale by his tenant, to the defendant Gephart, acquiesced in and ratified the sale, and looked to his tenant for pay for the property. There was evidence introduced, tending to show these facts.

The defendants asked the court to instruct the jury that, "if any person, being in the lawful possession, sells the personal property of another without authority, and the owner subsequently, and with knowledge of all the circumstances of the sale, acquiesces in, and ratifies it, although but for a short time, he becomes thereby bound by the sale, and cannot afterwards repudiate it to suit his convenience." This instruction, with others of like import, was refused, and such refusal is assigned as error.

We think this instruction embodies the law of the case,[92] and should have been given. Pars. on Contr. 45, 46, and note *a* (3d Ed.); Smith v. Hodson, 4 Durn. & East, 126–130; Therold v. Smith, 11 Modern, 71; Mathews v. Gilliss, 1 Iowa, 242. * * * Reversed.

[91] Part of the opinion is omitted.

[92] Accord: Sanders v. Peck, 87 Fed. 61, 30 C. C. A. 530 (1898), supra, p. 140; Rowland v. Barnes, 81 N. C. 234 (1879); Brock v. Jones, 16 Tex. 461 (1856); Hunter v. Cobe, 84 Minn. 187, 87 N. W. 612 (1901). It matters not that principal at first disapproved. His disapproval he may at any time countermand and by a subsequent assent ratify. Woodward v. Harlow, 28 Vt. 338 (1856). But if the principal repudiate the contract of the agent, he cannot speculate on the rise or fall in value, and after an unreasonable time ratify it, if it shall appear advantageous to him. Wilkinson v. Harwell, 13 Ala. 660 (1848).

(C) Ratification as to Agent

Appeal of BERGER.

(Supreme Court of Pennsylvania, 1880. 96 Pa. 443.)

Exceptions to the decree of the Court confirming auditor's report as to sheriff's sale of Hoig's real estate.

TRUNKEY, J. Thomas agreed to purchase of Hoig a tract of land. the bargain to be consummated when the encumbrances were removed. They met a number of creditors at the prothonotary's office, who released all Hoig's real estate from the lien of their judgments except one tract; and Marsh agreed that Berger's judgment should have preference in the order of lien to his own. Swift was acting as agent for Berger and refused to release Berger's judgment unless such priority was given, and signed the release upon assurance that Marsh so agreed. The agreement to give preference is in writing; the inducement or consideration is proved by oral testimony, and the fact is found by the auditor.

It is conceded that each creditor is bound by his release, on the faith of which Thomas took the land and paid the purchase-money. But Marsh claims that his contract to give Berger priority is nudum pactum, because Swift had no authority to release; and also because he recived no consideration for the postponement.

Upon the act of Swift, as agent for Berger, Thomas paid the purchase-money to Hoig. If Swift's act was authorized by the principal, he was not personally liable; but if he had no authority or exceeded the authority delegated to him, he became personally responsible to Thomas for the validity of the release. Where an agent has no authority and undertakes to act for the principal, he will be personally responsible therefor to the person with whom he is dealing for or on account of his principal; for by holding himself out as having authority to act he draws the other party into a reciprocal engagement. Whatever was done by Swift as agent is valid if subsequently ratified by Berger. A great jurist said, no maxim is better settled in reason and law than that a subsequent ratification has a retrospective effect, and is equivalent to a prior command.

The general rule is, that the subsequent assent of the principal to his agent's conduct renders the principal liable on contracts made in violation of the principal's orders, or even where there has been no previous retainer or employment; and this assent may be inferred from acts of the principal. Berger has pursued the land excepted from the release; he claims the money by virtue of Marsh's agreement; he excepted to the auditor's report, and has appealed to this court, insisting upon the enforcement of that agreement. No stronger evidence of ratification ought to be required. But Swift was his agent in fact for some purposes, and though informed of his agent's act, he did not dis-

avow it, and therefore he made the agent's act his own. Bredin v. Dubarry, 14 Serg. & R. 27. We discover nothing in this case to take it out of the operation of general and familiar rules relative to ratification by a principal of what has been done in his name by one acting as his agent. In general, the ratification of a contract originally made by one without authority, will relieve the agent from all responsibility if the contract purports to be made by him merely as agent, although without such ratification, he would be liable to the other party and also in some cases to the principal.[98]

The facts in this case clearly show a contract which could be approved by Berger and made his own. If the contract were void, no subsequent act would ratify it; the rule has exceptions. Where a contract has been made by a person with one as agent who has no authority, the parties do not always stand on equal terms; since the principal may elect to ratify the act or disavow it. This is not the only case where one contracting party may be bound before the other; for instance, one who makes an executory contract with an infant is liable thereon, though the infant may renounce or confirm when he arrives at majority; and a married woman may hold a party to performance of an agreement with her, though it could not be enforced against her. Thomas properly acted upon the release; had it not been ratified he would have remedy, if compelled to pay Berger's judgment, against Swift; the ratification has the same effect as original authority, and Berger is bound while Swift is not answerable at all. Now, the rights of the parties are to be considered as if Berger himself originally released and made the agreement with Marsh.

The consideration, in part if not entirely, for Berger's release, was Marsh's agreement to postpone the lien of his judgment on the remaining farm of Hoig. This was sufficient if the release conferred a slight benefit on Marsh or a third person; or if Berger suffered the least injury or inconvenience without benefiting any person. But it was a benefit to Hoig and Thomas, and it was a giving up of a right by Berger. It is immaterial that Marsh received no benefit, if he procured a benefit to another, or caused the appellant to part with a legal right. Mutual promises are a sufficient consideration for each other; Marsh and Thomas enjoy all which Berger gave and Marsh is bound by his contemporaneous promise.

It was pressed in argument that the appellee's judgment has the stronger claim in equity. This is not apparent. He contracted that his legal right of priority should be postponed in favor of the appellant. He himself wrote and signed the contract, and there is not the slightest evidence of fraud or imposition. It is manifest that for some cause he was generous to Hoig and wished the sale to Thomas con-

[98] To relieve the agent it must appear that the third person is in no worse position than he would have occupied had the agent acted under prior authority. The agent in general is not bound to give third persons notice of the ratification. Sheffield v. Ladue, 16 Minn. 388 (Gil. 346), 10 Am. Rep. 145.

summated, to which end he made the agreement; but there is nothing in that calling for its rescission.

Decree reversed and it is now considered and decreed that the judgment of Peter Berger is entitled to preference in the order of lien to the judgment of C. R. Marsh, and that the fund be appropriated accordingly. Costs of this appeal to be paid by the appellee.

LINGENFELDER v. LESCHEN.

(Supreme Court of Missouri, 1895. 134 Mo. 55, 34 S. W. 1089.)

Action to recover from an agent $5,009, the alleged difference between the value of certain real estate and the price at which defendant sold it to plaintiff. Defendant without written authority from the owner contracted that the latter would convey to plaintiff the land in question by warranty deed free from incumbrances. Defendant was willing to return to plaintiff $500 earnest money paid by him, with interest thereon. From judgment for $517.75 in his favor, plaintiff appeals.

BURGESS, J.[94] * * * There is perhaps no principle of law better established than that, where an agent undertakes to bind a principal when he has no power to do so, he thereby renders himself personally responsible; and the fact that he, in so doing, may have acted in the utmost good faith, and honestly believed that he had such power, makes no difference. Smout v. Ilbery, 10 Mees. & W. 1; Wright v. Baldwin, 51 Mo. 269; Gestring v. Fisher, 46 Mo. App. 603. The case last cited was an action for damages against the defendants, who had, without authority, sold plaintiff a lot in the city of St. Louis, and, by a written contract executed in the name of Bridge (the supposed owner of the property) by Fisher & Co., agents, promised to make a perfect title. Rombauer, P. J., in speaking for the court said: "But a contract of a real-estate agent in selling property intrusted to him for that purpose is peculiar. In absence of an express agreement to the contrary, he does not undertake to bind all claimants of the title, nor that he will sell an unincumbered, fee-simple title, but only that he will sell such title as his principal has. Whether the sale be finally consummated depends generally upon the further question whether his principal has a perfect title, or, if not, whether the vendee is satisfied with an imperfect title. The agent, by his agreement to negotiate a sale, assumes no obligation in reference to the title, unless it was made a part of his duty to have the title examined before attempting to effect a sale, * * * or unless he warrants the title to the vendee."

We do not understand that defendant, by the terms of the contract now under consideration, undertook to warrant the title to be in Mrs.

[94] Part of the opinion is omitted.

Tiekemeier, but that the extent of his undertaking was that she would do so. This seems clear from the provision in the contract by which it is agreed by and between the parties thereto that the title to the property will be conveyed by warranty, and perfect and free from all liens and incumbrances. There is nothing in the contract which can be fairly construed as a promise or agreement on the part of defendant to warrant the title, or that Mrs. Tiekemeier had the title in fee at the time the contract was entered into. He only contracted to sell, for her, her interest in the land; that she would make a warranty deed thereto,—and as, in doing this, he acted without authority from her, he should be held to respond in damages to the purchaser, unless the contract was subsequently, and before the expiration of the time within which the deed was to be delivered, ratified by her.

In Story, Ag. § 251, it is said: "Where a contract which has been originally made by the agent without authority is afterwards ratified by the principal, that ratification will, in general, relieve the agent from all responsibility on the contract, if it purports to be executed by him merely as an agent, although, without such ratification, he would be liable to the other contracting party for his misrepresentation or mistake of authority. Thus, if a person should, in his own name, but in the character of agent of the owner, sign a written agreement for the sale of an estate, without any authority from the owner, and the latter should afterwards sign the same agreement, and declare thereon that he sanctioned and approved the agent's having signed it in his behalf, the agent will no longer be personally liable on the contract, but his principal only will be liable, although the agent, without such ratification, might have been liable thereon." Roby v. Cossitt, 78 Ill. 638.

The ratification makes the instrument binding on the principal, to all intents and purposes, as if originally authorized by him; and the agent will not, under such circumstances, be personally liable, unless his personal liability is created by the instrument. Bray v. Gunn, 53 Ga. 144. While the authorities are somewhat in conflict as to whether or not the act of a person who assumes to represent as agent, without authority from the person in whose name the act is done, may be subsequently ratified by such person, the decided weight is that it may be, when done with a full knowledge of all the facts, and the evidence of such knowledge is clear. Bank v. Gay, 63 Mo. 33, 21 Am. Rep. 430, supra, p. 95, and authorities cited; Bless v. Jenkins, 129 Mo. 647, 31 S. W. 938, supra, p. 135.

Mrs. Tiekemeier, with a full knowledge of all the facts and circumstances attending the execution of the contract, seems to have done everything that was necessary to ratify the same and make it her contract. She not only procured a foreclosure of the deed of trust given by her deceased husband, and tendered to plaintiff a deed to the property from the purchaser at such sale, but she procured from the heirs of her husband quitclaim deeds, at the request of plaintiff, and, together with a deed of general warranty executed by herself, tendered

them to plaintiff, and thus, by unequivocal acts, ratified the contract of sale made by defendant. It is true that defendant had not obtained a deed for the property under the trustee's sale, but that fact did not in any way affect the ratification of the contract of sale by her. Mrs. Tiekemeier being unable to pass the title in fee to the property, and plaintiff having declined to accept such title as she could convey, he was only entitled to recover from defendant the amount paid by him as earnest money, and interest thereon, and the court correctly so ruled. Gestring v. Fisher, supra. We accordingly affirm the judgment.

TRIGGS v. JONES.

(Supreme Court of Minnesota, 1891. 46 Minn. 277, 48 N. W. 1113).

Action by Triggs against his agent Jones (impleaded with William O. Cook and Wilton George) asking for the cancellation of deeds from Triggs to Cook of land in Duluth, and for such other relief as might be just and equitable. It appeared that Cook owned a patent, half of which he offered to transfer to Jones if he would promote a corporation for its manufacture. Jones induced Triggs to subscribe for $15,000 of stock and to convey the Duluth land in payment. Triggs sent the deed to Jones, as he claimed, to be held in escrow till the corporation should be formed. Jones at once delivered it to Cook, who conveyed to George, an innocent purchaser. The corporation was never formed. Appeal from judgment for $15,000, with interest, against Jones.

MITCHELL, J.[95] [After disposing of certain questions of procedure, evidence, and damages:] * * * The remaining, and really the only important question in the case is as to the alleged ratification by plaintiff of the act of Jones in delivering the deed. It is claimed that, after knowledge of the facts, plaintiff ratified Jones' act, and that such ratification operated the same as original authority, and absolved Jones from all liability, even if the delivery of the deed was unauthorized when made. The court finds that Jones immediately informed plaintiff (by letter dated August 8, 1887) that he had delivered the deed to Cook, and that plaintiff did not at once repudiate the act, and never prior to the commencement of this action notified Cook that he repudiated, but left the deed in the possession of Cook, and joined with Jones in taking the preliminary steps in the formation of the contemplated corporation, in which it had been agreed that plaintiff was to receive stock as already stated. It was because of this delay to promptly repudiate the act of Jones that the court refused to grant plaintiff relief against defendant George, who was an innocent purchaser. But while the facts found may be evidence of a ratification,

[95] Part of the opinion is omitted.

they do not, as a matter of law, amount to that, at least in favor of Jones, the party who committed the unauthorized act.

It is, however, assigned as error that the court failed to find that plaintiff had ratified the delivery of the deed. It is impracticable to state, or even discuss, the evidence at length. A careful perusal of it satisfies us that, while plaintiff was informed by letter as early as August, 1887, that the deed had been delivered, yet this information was accompanied and frequently followed by statements and assurances from Jones to the effect that the original arrangement was being or would be carried out, so that he would get his stock as had been agreed, and that Cook would return the deed or reconvey the property if he (plaintiff) desired, etc., which were calculated to keep plaintiff quiet, and allay any possible fears on his part; and that, influenced and induced by these considerations, he made no express repudiation of Jones' act, but let matters rest, hoping and expecting that the deal would still be consummated according to agreement, and he get the stock to which he would be entitled; and that with this hope and expectation, and at the instance of Jones, in whom he seemed still to have implicit confidence, he sent a proxy to one Mahle, authorizing him to subscribe for stock in his name, and to vote it for officers of the company at the meeting for organization; but that finally having discovered that the whole scheme had fallen through, and would never be consummated, he brought this action to recover either the land or damages. At least, the evidence is such that it would have justified the court in taking this view of the facts.

There is no doubt that the general rule is that, by a ratification of an unauthorized act, the principal absolves the agent from all responsibility for loss or damage growing out of the unauthorized transaction, and that thenceforward the principal assumes the responsibility of the transaction, with all its advantages and all its burdens. Neither is there any question but that, where the rights and obligations of third persons may depend on his election, the principal is bound to act and give notice of his repudiation or disaffirmance of the unauthorized act at once, or at least within a reasonable time after knowledge of the act, and, if he does not so dissent, his silence will afford conclusive evidence of his approval. Such a rule is necessary to protect the rights of third parties who have dealt with the agent. If the principal, after knowledge, remains entirely passive, it is but just, when the protection of third parties require it, to presume that what, upon knowledge, he has failed to repudiate, he has tacitly confirmed. But it is apparent that the reasons for such a rule do not apply with equal force in favor of the agent himself, who has wrongfully committed the unauthorized act. Consequently mere passive inaction or silence, which would amount to an implied ratification in favor of third parties, might not amount to that in favor of the agent, so as to absolve him from liability to his principal for loss or damage resulting from the unauthorized act, especially if such inaction or failure to immediately dis-

affirm was induced by the assurances or persuasion of the agent himself.

Nor in this case does the affirmative action of the plaintiff, after knowledge of the delivery of the deed, in taking part in the preliminary steps for the organization of the contemplated stock company, of itself amount to a ratification of the unauthorized act. Such steps were right in the line of the original agreement between the parties, and were designed to carry it into effect. Induced, as such action probably was, by the assurances of Jones that the enterprise would still go on, and plaintiff get his stock, it really amounted to nothing more than an effort on plaintiff's part, after knowledge of Jones' deviation from his instructions, to avoid loss thereby, which is not such a ratification as will relieve the agent. Mechem, Ag. § 173. Upon proof that Jones' act was without original authority, the burden was upon him to show such a subsequent ratification as would relieve him from liability.

The court has not found any such ratification, and, in our opinion, under the evidence, he was justified in finding, as he in effect does, that there was none. Order affirmed.

SCHANZ v. MARTIN.

(Supreme Court of New York, Appellate Term, 1902. 37 Misc. 492, 75 N. Y. Supp. 997.)

Appeal from judgment of the Municipal Court of the City of New York for plaintiffs.

GIEGERICH, J.† The defendant was a salesman of the plaintiffs, and, without authority, collected from one of their customers the price of two suits of clothes. They brought an action against the customer, but, upon discovering that the defendant had collected for the suits, discontinued that action, and began this one against the defendant for conversion, and obtained judgment. The appellant challenges the judgment, on the ground that the plaintiffs failed to show (as is requisite to the maintenance of an action for conversion) either ownership of the money or an immediate right to its possession.

The appellant seems to concede that an action for money had and received would lie, on the theory that by bringing such an action the plaintiffs would ratify the otherwise unauthorized act, thereby imposing upon the defendant an obligation, based on the theory of a quasi contract, to turn over the money. Keener, Quasi Cont. 167. No reason is obvious, however, why an action for conversion will not lie as well. The discontinuance of the suit against the customer, and the institution of a suit of any character against the defendant, would

† Part of the opinion is omitted.

be a ratification of the act of collecting, and a retroactive authorization to the defendant to collect.[96] "A subsequent ratification is equivalent to an original command." Doty v. Wilson, 14 Johns. 379, 382; Hamlin v. Sears, 82 N. Y. 327, 331. Omnis ratihabitio retrotrahitur et mandato priori æquiparatur. Brown, Leg. Max. 781; Story, Ag. § 445.

But it does not necessarily follow that there would be an authorization to retain, as well as to collect, the money. An agent may be authorized both to collect and to retain money, and mingle it with his own or other money, in which event there are numerous authorities that he is not liable for conversion. Walter v. Bennett, 16 N. Y. 250; Conaughty v. Nichols, 42 N. Y. 83; Vandelle v. Rohan, 36 Misc. 239, 73 N. Y. Supp. 285. Or he may be authorized to collect a single claim and to deliver to his principal the identical money received, in which case he is liable for conversion. See Farrelly v. Hubbard, 148 N. Y. 592, 43 N. E. 65; Donohue v. Henry, 4 E. D. Smith, 162. The former is the usual situation where an agent has authority to make collections generally, or to make more than one collection, but where such authority is confined to a single case, as here, it is plain that there is not merely a debt owing from the agent to the principal, but an obligation to pay over the identical money.

The case of Farrelly v. Hubbard, supra, is quite in point. The court there said (148 N. Y. 594, 595, 43 N. E. 66): "The plaintiff assigned to the defendant, by an instrument in writing, the wages or salary due him from the New York, Lake Erie & Western Railroad Company (in whose employ he then was), for the month of December, 1886, constituting him his attorney to collect and receipt for it * * * The language of the contract of assignment, already quoted, is perfectly clear, and shows that the defendant in the action in justice's court was acting solely as the servant of the defendant in this action, and it was his duty to have immediately carried the money or check to his assignee, and, not doing so, he became liable for conversion upon failure to pay over on demand."

In Donohue v. Henry, supra, it was said (page 163): "It is objected that trover will not lie for this item of money. That is true when the money has gone into the defendant's possession with the plaintiff's assent, and permitted to be mixed up with his own money; but where money is received from a third person, the party to whom the money belonged has a right to insist upon receiving the identical money so collected, and if not delivered on request may maintain a possessory action therefor." * * *

The appellant's claim that the plaintiffs are bound by what he calls their election to sue the customer, rather than him, takes no account

[96] So where an agent without authority took horses in payment of a debt due his principal, the court held the principal might ratify and recover the horses from the agent. Hormann v. Sherin, 6 S. D. 82, 60 N. W. 145 (1894).

of the principle that there can be no election without knowledge of the facts. It was not until the trial of the action against the customer that the plaintiffs first learned that the bill had been paid to the defendant, and of their consequent right against him. The judgment should be affirmed, with costs.

SHEPHERD v. GIBBS.

(Supreme Court of Michigan, 1891. 85 Mich. 85, 48 N. W. 179.)

Assumpsit. Defendant brings error. Affirmed.

MORSE, J. Plaintiff brought suit in justice court upon the following promissory note: "$50.00. St. Louis, Mich., Nov. 27, 1883. Ninety days after date, for value received, I promise to pay to the order of William D. Gibbs fifty dollars at the banking-house of Darragh & Co., St. Louis, Mich., with ten per cent. interest after due. Truman Gibbs." The note was duly indorsed by William D. Gibbs. Plaintiff recovered judgment, from which the defendant appealed to the circuit court for the county of Isabella. The circuit judge directed a verdict for the plaintiff for the full amount of the note and interest.

The defense was that there was no consideration for the note. The defendant, to make out his case, introduced testimony tending to show that the note was given in consideration of the plaintiff's assisting him in purchasing a certain piece of land of one Thompson. The plaintiff had business relations with Thompson, and told defendant that he could, by reason of such business relations, purchase the land much cheaper than defendant could, enough so that he could afford to pay him $50 for his services and influence in buying the land. Upon these representations, and the understanding from plaintiff that he could get the land of Thompson for $400, defendant turned over to plaintiff a note for $400 against third parties, not yet due, and received from plaintiff an order to Thompson to give defendant a deed of the land, and charge the purchase price, $400, to plaintiff. Defendant took the order, and went to see Thompson. Before he showed the order to Thompson defendant asked him how much he wanted for the land, and Thompson told him he held it at $400. Defendant, however, presented the order of plaintiff to Thompson, and received his deed upon it. He said nothing to plaintiff about any dissatisfaction with his bargain or his arrangement with plaintiff until after the note became due, when he refused to pay it.

The testimony on the part of the plaintiff showed a different state of facts, but in our view of the case it is not necessary to set it out. The circuit judge held that it was the duty of defendant, when he found out from Thompson, before he presented the order of the plaintiff, that he could himself purchase the land for $400, to have repudiated his bargain with plaintiff, and tendered him back his order, and demanded his notes. But failing to do this, and using the order of

the plaintiff as so much money with which to purchase the land, he acted upon and ratified his agreement with plaintiff with full knowledge of all the facts in the case, and could not afterwards repudiate it.[97]

The circuit judge was clearly right in his ruling, and the judgment will be affirmed, with costs.

(D) As to the Principal

OVERBY v. OVERBY.

(Supreme Court of Louisiana, 1866. 18 La. Ann. 546.)

HYMAN, C. J. In the year 1863, one of plaintiff's brothers brought a lot of plaintiff's cotton and stored it at Mr. Billings' plantation, in the parish of Morehouse.

Plaintiff, who resided in Kentucky, came to this state, and, when about to return to that state, he left the cotton in charge of his brother, E. P. Overby, to do with it as if it was his own.

In the year 1864, the cotton-burners of the Confederate States visited the said parish, and commenced their work of destruction.

E. P. Overby, desirous of saving his brother's cotton from being burned, applied to several persons to get them to remove and conceal the same from the burners, offering a half of the cotton that might be saved by removal and concealment, to any person who would undertake to remove and conceal it. This proposition, refused by several, was accepted by William R. Ward, who removed, concealed and saved one hundred and seventeen bales of the cotton, and E. P. Overby gave him (Ward) 58½ bales of same.

Plaintiff in this case sued Ward to recover of him the 58½ bales of cotton, or their value. One of the defences set up by Ward in his answer is, that the agent, E. P. Overby, had authority to make the contract, and that plaintiff had ratified the acts of the agent. The trial of the case resulted in a verdict and judgment for defendant. Plaintiff has appealed.

On plaintiff's coming again into this state, he was informed, on inquiry, that his brother, E. P. Overby, had saved some of his (plain-

[97] Ratification by a principal of a tort cannot relieve the tort feasor of liability to the third persons wronged. The fact that he acts for another, by authority previously or subsequently conferred, cannot absolve the agent from his liability to the person wronged. Wright v. Eaton, 7 Wis. 595 (1859); Richardson v. Kimball, 28 Me. 463 (1848); Perminter v. Kelly, 18 Ala. 716, 54 Am. Dec. 177 (1851); Burnap v. Marsh, 13 Ill. 535 (1852); Josselyn v. McAllister, 22 Mich. 300 (1871). And this is true even when the agent acts in good faith, as when he sends the goods of a third person to his principal, supposing them to belong to his principal. Stephens v. Elwell, 4 Maule & Selwyn, 259 (1815). Such ratification will, however, relieve the agent of tort liability to the principal. The latter need not ratify; but, if he does, he waives the wrong committed by the agent, and can hold him only as for an authorized act. Judah v. Trustees of Vincennes University, 16 Ind. 56 (1861); Szymanski v. Plassan, 20 La. Ann. 90, 96 Am. Dec. 382 (1868).

tiff's) cotton, by giving one-half for removing the other. He replied, on receiving this information, that whatever his brother had done would be satisfactory to him.

His not dissenting, but rather assenting, to what had been done by his agent, ratified the contract that his agent had made with Ward. A ratification by the principal, of a contract made by his agent, not authorized to make such contract, binds the principal, as fully as if the agent had been empowered to make the contract. Civil Code, No. 2990.[98]

Judgment affirmed, plaintiff to pay costs.

GOSS v. STEVENS.

(Supreme Court of Minnesota, 1884. 32 Minn. 472, 21 N. W. 549.)

DICKINSON, J. The plaintiffs seek to recover a stipulated compensation for their services, as agents of the defendant, in selling real property of the latter. At the trial, upon the plaintiff's case being closed, the court dismissed the action. The appeal is from an order refusing a new trial.

It appeared upon the trial that the defendant, by a written memorandum, authorized the plaintiffs to sell for him a certain tract of land upon terms, as to price and manner of payment, particularly set forth; and promised, upon sale of the property, to pay plaintiffs a stated commission. The evidence went to show that after this authorization the plaintiffs agreed with certain parties (Avery and Walters) for the sale of the property to them, upon terms materially different from those prescribed by the defendant; and that the plaintiffs, as agents, executed with the purchasers a writing embodying a statement of the contract of sale, and a specific agreement, on the part of Avery and Walters, to purchase the property on the terms stated therein. In the body of this instrument the plaintiffs are recited to have made the sale "as authorized agents," and to their signature are added the words, "Agents of L. H. Stevens." The plaintiffs having proved the execution of this contract, and having offered evidence going to show that the defendant had ratified it, offered the contract in evidence. This was rejected.

[98] "That the effect of ratification as to the principal is to bind him by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences that follow from, the same act done by his previous authority," is held by Tindal, C. J., in Wilson v. Tumman, ante, p. 85. See, also, Brock v. Jones, 16 Tex. 461 (1856); Hunter v. Cobe, 84 Minn. 187, 87 N. W. 612 (1901); Lee v. Fontaine, 10 Ala. 755, 44 Am. Dec. 505 (1846); Walker v. Walker, 5 Heisk. (Tenn.) 425 (1871). And, in general, it matters not whether the agent used his name, or that of his principal, so long as the bargain as carried out was ratified by the principal. Campbell, J., in Stansell v. Leavitt, 51 Mich. 536, 16 N. W. 892 (1883).

We think the court erred.[99] There was abundant evidence to entitle the plaintiffs to go to the jury upon the question of ratification, going to show that the defendant, after he had been advised as to the terms of the contract which had been made by his agents in his behalf, acquiesced in and confirmed their acts. Since the agents might have been orally authorized to make the sale (Brown v. Eaton, 21 Minn. 409; Dickerman v. Ashton, 21 Minn. 538), their unauthorized acts done in defendant's behalf might be ratified in any manner expressing his assent thereto. It was not necessary that the ratification be in writing. Brown v. Eaton, 21 Minn. 409, 410. Ratification of the unauthorized sale would relate back to the acts of the agent and be equivalent to prior authority. Stewart v. Mather, 32 Wis. 344; Nesbitt v. Helser, 49 Mo. 383.

This contract, if ratified by the defendant so as to cure the variance from the prescribed terms of sale, would have been prima facie proof of the plaintiffs' right to recover. It bound the purchasers to take the property upon the terms stated, and this constituted a sale of the property within the meaning of the agreement between the plaintiffs and the defendant. Goss v. Broom, 31 Minn. 484, 18 N. W. 290; Rice v. Mayo, 107 Mass. 550. The contract bears upon its face the character of a contract between the plaintiffs' principal, executed through them as agents, and the purchasers. In an action upon the contract parol evidence would be admissible, if any proof was necessary, to disclose the defendant as the principal in whose behalf the contract was made. Rowell v. Oleson, 32 Minn. 288, 20 N. W. 227, and cases cited. Having bound the parties by an authorized contract, any inability or refusal of the principal to consummate the contract which he had authorized should not affect the agents' right to compensation. Mooney v. Elder, 56 N. Y. 238; Delaplaine v. Turnley, 44 Wis. 31; Phelan v. Gardner, 43 Cal. 306; Nesbitt v. Helser, 49 Mo. 383.

The order refusing a new trial is reversed, and a new trial awarded.

DEMPSY v. CHAMBERS.

(Supreme Judicial Court of Massachusetts, 1891. 154 Mass. 330, 28 N. E. 279, 13 L. R. A. 219, 26 Am. St. Rep. 249.)

HOLMES, J. This is an action of tort to recover damages for the breaking of a plate-glass window. The glass was broken by the negligence of one McCullock while delivering some coal which had been ordered of the defendant by the plaintiff. It is found as a fact that McCullock was not the defendant's servant when he broke the window, but that the "delivery of the coal by [him] was ratified by the de-

[99] **After ratification, the principal cannot hold the agent for not performing the act as he was authorized. He ratified the act *as it was done*, and released the agent from liability for disobedience to, or departure from, his authority. Menkens v. Watson, 27 Mo. 163 (1858).**

fendant, and that such ratification made McCullock in law the agent and servant of the defendant in the delivery of the coal." On this finding the court ruled "that the defendant, by his ratification of the delivery of the coal by McCullock, became responsible for his negligence in the delivery of the coal."[100] The defendant excepted to this ruling, and to nothing else. We must assume that the finding was warranted by the evidence, a majority of the court being of the opinion that the bill of exceptions does not purport to set forth all the evidence on which the finding was made. Therefore the only question before us is as to the correctness of the ruling just stated.

If we were contriving a new code to-day we might hesitate to say that a man could make himself a party to a bare tort in any case merely by assenting to it after it had been committed. But we are not at liberty to refuse to carry out to its consequences any principle which we believe to have been part of the common law simply because the grounds of policy on which it must be justified seem to us to be hard to find, and probably to have belonged to a different state of society.

It is hard to explain why a master is liable to the extent that he is for the negligent acts of one who at the time really is his servant, acting within the general scope of his employment. Probably master and servant are "feigned to be all one person" by a fiction which is an echo of the patria potestas and of the English frankpledge. Byington v. Simpson, 134 Mass. 169, 170, 45 Am. Rep. 314; Fitzh. Abr. "Corone," pl. 428. Possibly the doctrine of ratification is another aspect of the same tradition. The requirement that the act should be done in the name of the ratifying party looks that way. New England Dredging Co. v. Rockport Granite Co., 149 Mass. 381, 382, 21 N. E. 947; Fuller & Trimwell's Case, 2 Leon. 215, 216; Sext. Dec. 5, 12; De Reg. Jur. Reg. 9; D. 43, 26, 13; D. 43, 16, 1, § 14, gloss., and cases next cited.

The earliest instances of liability by way of ratification in the English law, so far as we have noticed, were where a man retained property acquired through the wrongful act of another. Y. B. 30 Edw. I. 128 (Roll's Ed.;) 38 Lib. Ass. 223, pl. 9; S. C. 38 Edw. III. 18; 12 Edw. IV. 9, pl. 23; Plowd. 8 ad fin. 27, 31. See Bract. 158b, 159a, 171b. But in these cases the defendant's assent was treated as relating back to the original act, and at an early date the doctrine of relation was carried so far as to hold that, where a trespass would have

[100] Acceptance, with knowledge of the circumstances, of the fruits of an act in performing which the agent committed an assault, makes the principal liable for the tort, and liable in punitive damages. Avakian v. Noble, 121 Cal. 216, 53 Pac. 559 (1898). But not if the principal, when accepting the avails, had no knowledge of the culpable act of the agent. Marsh v. Joseph, [1897] 1 Ch. 213, 66 L. J. Ch. 128, 75 L. T. Rep. N. S. 558, 45 W. R. 209. Nor if the tort was not done for the benefit of the principal. Moore v. Rogers, 51 N. C. (6 Jones) 297 (1859), quoting Lord Coke: "He that receiveth a trespasser and agreeth to a trespass after it is done is no trespasser, unless the trespass was done to his use or for his benefit, and then his agreement subsequent amounteth to a commandment; for in that omnis ratihabitio retrotrahitur, et mandato æquiparatur." 4 Inst. 317; Broom's Legal Maxims, 383.

been justified if it had been done by the authority by which it purported to have been done, a subsequent ratification might also justify it. Y. B. 7 Hen. IV. 34, pl. 1. This decision is qualified in Fitzh. Abr. "Bayllye," pl. 4, and doubted in Brooke, Abr. "Trespass," pl. 86, but it has been followed and approved so continuously and in so many later cases that it would be hard to deny that the common law was as there stated by Chief Justice Gascoigne. Godb. 109, 110, pl. 129; 2 Leon. 196, pl. 246; Hull v. Pickersgill, 1 Brod. & B. 282; Muskett v. Drummond, 10 Barn. & C. 153, 157; Buron v. Denman, 2 Exch. 167, 178; Secretary of State v. Sahaba, 13 Moore, P. C. 22, 86; Cheetham v. Mayor, etc., L. R. 10 C. P. 249; Wiggins v. U. S., 3 Ct. Cl. 412.

If we assume that an alleged principal, by adopting an act which was unlawful when done can make it lawful, it follows that he adopts it at his peril, and is liable if it should turn out that his previous command would not have justified the act. It never has been doubted that a man's subsequent agreement to a trespass done in his name and for his benefit amounts to a command so far as to make him answerable. The ratihabitio mandato comparatur of the Roman lawyers and the earlier cases (D. 46, 3, 12, § 4; D. 43, 16, 1, § 14; Y. B. 30 Edw. I. 128) has been changed to the dogma æquiparatur ever since the days of Lord Coke. 4 Inst. 317. See Brooke, Abr. "Trespass," pl. 113, Co. Litt. 207a; Wing. Max. 124; Com. Dig. "Trespass," C. 1; Railway Co. v. Broom, 6 Exch. 314, 326, 327, and cases hereafter cited.

Doubts have been expressed, which we need not consider, whether this doctrine applied to a case of a bare personal tort. Adams v. Freeman, 9 Johns. 117, 118; Anderson and Warberton, JJ., in Bishop v. Montague, Cro. Eliz. 824. If a man assaulted another in the street out of his own head, it would seem rather strong to say that if he merely called himself my servant, and I afterwards assented, without more, our mere words would make me a party to the assault, although in such cases the canon law excommunicated the principal if the assault was upon a clerk. Sext. Dec. 5, 11, 23. Perhaps the application of the doctrine would be avoided on the ground that the facts did not show an act done for the defendant's benefit, (Wilson v. Barker, 1 Nev. & M. 409, 4 Barn. & Adol. 614; Smith v. Lozo, 42 Mich. 6, 3 N. W. 227;) as in other cases it has been on the ground that they did not amount to such a ratification as was necessary, (Tucker v. Jerris, 75 Me. 184; Hyde v. Cooper, 26 Vt. 552.)

But the language generally used by judges and text-writers, and such decisions as we have been able to find, is broad enough to cover a case like the present, when the ratification is established. Perley v. Georgetown, 7 Gray, 464; Bishop v. Montague, Cro. Eliz. 824; Sanderson v. Baker, 2 W. Bl. 832, 3 Wils. 309; Barker v. Braham, 2 W. Bl. 866, 868, 3 Wils. 368; Badkin v. Powell, Cowp. 476, 479; Wilson v. Tumman, 6 Man. & G. 236, 242; Lewis v. Read, 13 Mees. & W. 834; Buron v. Denman, 2 Exch. 167, 188; Bird v. Brown, 4 Exch. 786, 799;

Railway Co. v. Broom, 6 Exch. 314, 326, 327; Roe v. Railway Co., 7 Exch. 36, 42, 43; Ancona v. Marks, 7 Hurl. & N. 686, 695; Condit v. Baldwin, 21 N. Y. 219, 225, 78 Am. Dec. 137; Exum v. Brister, 35 Miss. 391; Railway Co. v. Donahoe, 56 Tex. 162; Murray v. Lovejoy, 2 Cliff. 191, 195, Fed. Cas. No. 9,963. See Lovejoy v. Murray, 3 Wall. 1, 9, 18 L. Ed. 129; Story, Ag. §§ 455, 456.

The question remains whether the ratification is established. As we understand the bill of exceptions, McCullock took on himself to deliver the defendant's coal for his benefit, and as his servant, and the defendant afterwards assented to McCullock's assumption. The ratification was not directed specifically to McCullock's trespass, and that act was not for the defendant's benefit, if taken by itself, but it was so connected with McCullock's employment that the defendant would have been liable as master if McCullock really had been his servant when delivering the coal. We have found hardly anything in the books dealing with the precise case, but we are of opinion that consistency with the whole course of authority requires us to hold that the defendant's ratification of the employment established the relation of master and servant from the beginning, with all its incidents, including the anomalous liability for his negligent acts. See Coomes v. Houghton, 102 Mass. 211, 213, 214; Cooley, Torts, 128, 129.

The ratification goes to the relation, and establishes it ab initio. The relation existing, the master is answerable for torts which he has not ratified specifically, just as he is for those which he has not commanded, and as he may be for those which he has expressly forbidden. In Gibson's Case, Lane, 90, it was agreed that if strangers, as servants to Gibson, but without his precedent appointment, had seized goods by color of his office, and afterwards had misused the goods, and Gibson ratified the seizure, he thereby became a trespasser ab initio, although not privy to the misusing which made him so; and this proposition is stated as law in Com. Dig. "Trespass," C. 1; Elder v. Bemis, 2 Metc. (Mass.) 599, 605. In Coomes v. Houghton, 102 Mass. 211, the alleged servant did not profess to act as servant to the defendant, and the decision was that a subsequent payment for his work by the defendant would not make him one.

For these reasons, in the opinion of a majority of the court, the exceptions must be overruled. Exceptions overruled.

(E) As to Third Person

FARMERS' LOAN & TRUST CO. v. MEMPHIS & C. R. CO.

(Circuit Court of the United States, W. D. Tennessee, 1897. 83 Fed. 870.)

LURTON, Circuit Judge.[101] This is a bill under which it is sought to foreclose a mortgage styled the "first consolidated mortgage" of the Memphis & Charleston Railroad Company. It was intended that two older series of bonds would be retired by bonds secured hereunder. In part this has been done, though not altogether. It is therefore sought to sell subject to the lien of the senior outstanding mortgages. This consolidated mortgage was made August 20, 1877, to secure an issue of bonds aggregating $4,700,000. Of these only $2,264,000 have been actually issued. The remainder are in the hands of the trustee, and held for the purpose of taking up outstanding first and second mortgage bonds. These consolidated bonds mature January 1, 1915, and have annexed coupons for interest, payable each recurring six months. The case comes on now to be heard upon the pleadings and proof, and a final decree of foreclosure is sought, both for principal and interest. The right to such a decree is predicated upon a default in the payment of interest accruing July 1, 1893, January 1, 1894, July 1, 1894, January 1, 1895, and July 1, 1895; this bill having been filed August 2, 1895.

The bill particularly alleges that demand had been made for the payment of the interest accruing July 1, 1893, and that payment was refused; that this default continued for more than 60 days after such demand; that thereupon holders of more than one-third in value of the outstanding bonds had, by an instrument in writing, filed with the trustee, elected that the principal of the said bonds should immediately become payable, and requiring the trustee to foreclose the mortgage. * * *

The principal objection urged against a decree of foreclosure for the principal of the mortgage debt turns upon the authority of one D. Willis James to sign the declaration of maturity for his wife, who owned four bonds of $1,000 each, and for two brothers, each owning twenty bonds of $1,000 each. Mr. James signed the names of his wife and brothers by himself as attorney. The defendants say that he was not the "attorney in fact thereto duly authorized" of the said signers, and that, if these names be eliminated, a valid election by one-third in value of all outstanding bonds has not been declared. It clearly appears that Mr. James had a general parol authority from his wife and brothers to act for them as he deemed best in respect to the management and disposition of these securities. But it is also admitted that he had no written letter of attorney particularly au-

[101] Part of the opinion is omitted.

thorizing him to do this act. That these persons owned the bonds for which their names are signed is sufficiently made out by the general statement to that effect in Mr. James' deposition. Being wholly undisputed, we see no reason for inquiring into the source of his information.

After the filing of this bill, these persons, in writing, formally confirmed and ratified the act of D. Willis James in making the declaration of maturity now in question. If the legal effect of this ratification is to put the agent in same position as if he had had authority to do the act when done, there is no necessity for considering the question at the bar as to the meaning of the provision in the mortgage touching the election of holders of bonds through "attorneys in fact thereto duly authorized." The general doctrine in respect of the ratification of the acts of one assuming without authority to act for another is that a subsequent "ratification operates upon the act ratified precisely as though the authority to do the act had been previously given." Cook v. Tullis, 8 Wall. 338, 21 L. Ed. 933. "In short," says Justice Story, "the act is treated throughout as if it were originally authorized by the principal, for the ratification relates back to the time of the inception of the transaction, and has a complete retroactive efficacy, or, as the maxim expresses it, 'Omnis ratihabitio retrotrahitur.'" Story, Ag. § 244.

The principle is clearly stated in the well-considered case of Wilson v. Tumman, 6 Man. & G. 236, where it is said: "An act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him. In such case the principal is bound by the act, whether it be for his detriment or advantage, and whether it be founded on a tort or on contract, to the same extent, and with all the same consequences, which follow from the same act done by his previous authority."

Counsel for defendants seek to take this case without the general effect of ratification by an application of the not very clear statement of a limitation found in section 246 of Story on Agency, where it is said that third persons will not be bound by the retrospective consequences of ratification "if the act done by such person would, if authorized, create a right to have some act or duty performed by a third person, so as to subject him to damages or losses for the nonperformance of that act or duty, or would defeat a right or an estate already vested in the latter." This limitation is evidently deduced from such cases as Buron v. Denman, 2 Exch. 167, Right v. Cuthell, 5 East, 491, and Mann v. Walters, 10 Barn. & C. 626. These were cases of notices given of the determination of leases by unauthorized persons assuming to be agents of the landlord. That Judge Story bases his text upon that class of cases is not only evident from the cases cited in the notes to the text, but from the stronger fact that he illustrates the meaning of an otherwise cloudy statement by the illustration:

"Thus, if a lease contains a condition that it may be determined by either party upon six months' notice, such notice, given by an unauthorized person for the landlord, although subsequently ratified and adopted by the latter, will not be a valid notice to determine the lease."

The ground upon which such cases have been put is that stated in the subsequent part of the section from which I have been quoting, namely, that a notice to defeat an estate should be such a one as that the tenant can safely act upon at the time he receives it, "so that he may deliver up the possession at the end of six months, without being liable to further claims in respect to the remainder of the term." The cases upon this subject have not been uniform. To this Judge Story calls attention in a footnote. In Roe v. Pierce, 2 Camp. 96, a verbal notice to quit, by a steward of a corporation, was held ratified and binding by the corporation bringing a suit founded on the notice; and in Goodtitle v. Woodward, 3 Barn. & Ald. 689, the decision is put upon ground quite antagonistic to the cases first cited. If such cases as Buron v. Denman and others cited above are supportable, it must be upon the ground that the tenant ought not to be subjected to the hazard of going out and remaining liable thereafter because the landlord elected to repudiate the notice given in his name. If not rested wholly upon this narrow ground, they are in seeming conflict with an older line of cases holding that an entry to make a claim, or to avoid a fine, or for a condition broken, if made by a person assuming to be the agent of the principal entitled to such claim or entry, would justify an action upon such acts by the principal upon the ground that his subsequent ratification would supply the want of an original authority. Story, Ag. § 245; Co. Litt. 258; Fitchet v. Adams, 2 Strange, 1128.

The distinction between the class of cases last cited and those of a notice to terminate a lease is very refined, and, as observed by Judge Story in a note to section 246 of his work on Agency, "stands upon reasoning not very satisfactory or clear." Judge Story, in his text, states the supposed distinction to be this: that in the latter case "the third person's act is not to depend upon the validity of the entry at the time when it is made." And so, he adds: "The rule, 'omnis ratihabitio retrotrahitur et mandato priori æquiparatur,' seems applicable only to cases where the conduct of the parties on whom it is to operate, not being referable to any agreement, cannot, in the meantime, depend on the fact whether there be a ratification or not."

Counsel for defendants do not—and I say it with deference—make a proper application of Judge Story's deduction from the leasehold cases. They say, in their printed argument, this: "The underlying principle is perfectly plain. If A. has acted as the agent of B., and B. has ratified the act done, and taken advantage of it, if C. thereupon sues B. upon such act recognizing the agency, B. and C. have both (the one by the ratification of, and the other by his suit, recognizing the agency) estopped themselves mutually from denying it. But if

A., not being the agent of B., undertake to act for him so as to allow B. to acquire a right against C., and B., by ratification, attempt to acquire such right as one arising at the time A. acted, and dating back to such time, such ratification is unavailing over C.'s objection. There is no mutuality in the estoppel. Until B. ratified, he was not bound, and, C. having done no act to consent to the ratification and recognition of the unauthorized agency against C. in invito, the agency cannot exist except from the time the authority was actually given. It is not the case of a party being bound by the ratification of an agency, but of a party seeking by his own act of ratification to bind the other party. A similar case would be where a plaintiff recognized a person who was not defendant's agent as such agent, while defendant refused to recognize and ratify, and who sought to bind defendant by the acts of such unauthorized agent because plaintiff had ratified his acts. This, of course, is absurd, but it is the reductio ad absurdum of complainant's position in this case."

But that the effect of ratification is to bind the other contracting party is the very consequence of the retrospective effect of ratification. The books are full of cases in which the third party was held bound by a subsequent ratification. Were this not so, the act of "ratification would not be dragged back, as it were, and made equipollent to a prior command," as the matter is put by Baron Martin in Brook v. Hook, L. R. 6 Exch. 96. "Thus," Judge Story says, "the effect of ratification is not only to bind the principal as to his agent, but as to the third party, and give the ordinary rights and remedies both for and against him." Story, Ag. § 245.

In Wharton on Agency it is said: "The third party contracting is bound from the time of the institution of the contract, and not merely from that of the ratification. The principal, by the act of ratification, puts himself in his agent's place. From this it follows that the ratification acts retrospectively, and nowhere is this more unhesitatingly expressed than in the Roman law. But," adds Prof. Wharton, "accepting this principle as unquestioned, we must limit its application to the relations of the principal to the contracting third party. The third party is precluded from contesting the right of the principal to go back to the original inception of the contract." Whart. Ag. §§ 76, 77.

In the Law of Contracts, by Leake, at page 391, it is stated that: "The principal may also claim the benefit of a contract professedly made on his behalf, and though it was made without his knowledge."

A few illustrations from leading cases may serve to show how the retrospective effect of ratification has found application. Where contracts were made in the name of the state, but without authority, a subsequent ratification was held to bind the third party in suits upon the contract. Ohio v. Buttles' Ex'r, 3 Ohio St. 309; Wisconsin v. Torinus, 26 Minn. 1, 49 N. W. 259, 37 Am. Rep. 395; Iowa v. Shaw, 28 Iowa, 67. Where insurance was effected by an unauthorized agent

upon the interest of the plaintiff in a ship, it was held that the ratification of this act after the loss of the ship was operative, and made the contract binding upon the insurer. Hagedorn v. Oliverson, 2 Maule & S. 485. Where an offer of sale, made by C., was accepted by B. for A., it was held that by ratifying the act of B., though after the offer had been withdrawn, the contract was validated as of the date of the original acceptance, and that the intermediate withdrawal was ineffective, and C. bound by the contract. Bolton v. Lambert, 41 Ch. Div. 295. This case was followed in Re Portuguese Consolidated Copper Mines, 45 Ch. Div. 16. In the case last cited certain shares in the corporation had been subscribed for, and allotments made, in the name of the corporation, by a board having no authority. Subsequently these allotments were ratified by the corporation acting by a legal board of directors. It was held that the subscribers were bound, although they, before ratification, had withdrawn their subscriptions. That Mr. James' principals did not ratify his act until after this bill was filed seems of no importance if the ratification is to be given a retrospective effect. Where a bill was indorsed to one Ancona, and a suit brought in his name as plaintiff by one assuming to be his agent, it was held that Ancona's ratification, after suit brought, of what had been done before, was equivalent to a prior authority. Ancona v. Marks, 7 Hurl. & N. 686.

These cases abundantly illustrate what is meant by the ratification being equivalent to a prior command, and serve to show that the effect is not only to bind the principal ratifying the act, but also the other contracting party. There are exceptions to this rule, such as have been mentioned by both Story and Wharton, namely, it will not be permitted to defeat an estate vested in the third party, as in Lyell v. Kennedy, 18 Q. B. Div. 796, and it will not be suffered to affect innocent strangers who have acquired intervening rights by levy, attachment, or otherwise. Wood v. McCain, 7 Ala. 806, 42 Am. Dec. 612; Whart. Ag. §§ 77–79; Taylor v. Robinson, 14 Cal. 396. Certainly neither the railroad company nor the junior mortgagee have acquired any intervening rights to be affected by ratification, and it is not pretended that its effect will be to defeat any vested estate. Neither can it be said that the conduct of the railroad company, on whom ratification is to operate, depended in the meantime on whether there would be ratification or not. The holders of these bonds had an option to mature the principal according as they should deem best. That option arose out of the default of the railroad company in respect of interest. When that default was suffered to continue for 60 days after demand, the option arose, and could only be cut off by payment before a declaration of maturity.

The coupon in respect to which the original bill made a definite statement of demand was paid, but not until after the declaration of maturity, which declaration operated, when filed with the trustee, to mature the principal. It follows, therefore, that payment of that

coupon did not defeat the suit, for the whole debt was due and unpaid, except the coupon of July, 1893. Between the filing of the instrument of maturity and the time of ratification the debtor company did nothing, and incurred no loss, risk, or danger. The instrument purported to be signed by one authorized to act for those whose names he signed. It was an act clearly in the interest of those for whom he assumed to act, and its ratification could not possibly work a surprise. It was only a matter of evidence whether James had authority to sign for his wife and brothers, and "proof of subsequent ratification is sufficient, and dispenses with proof of prior authority, though the prior authority is required to be in writing or under seal." Leake, Cont. pp. 388–391; Tupper v. Foulkes, 9 C. B. (N. S.) 797; Bolton v. Lambert, 41 Ch. Div. 295.

Commenting on the conflict we have referred to in an earlier part of this opinion, Prof. Wharton says, at section 80 of his Commentaries on Agency: "The true distinction seems to be this: If ratification on part of principal was an act to be anticipated as morally certain by parties having adverse interests, then the ratification is no surprise to them, and cannot mislead them, and they are bound to treat the original unauthorized act as one which is to be authorized."

Applying this to the defendants, they must be regarded as bound by the ratification which, in view of the relationship borne by D. Willis James to those he assumed to represent, and the obvious interest they have in ratifying what he did, can be no surprise to them. In this view of the case, it becomes unnecessary to say whether this bill might be maintained as a bill to foreclose for interest alone, or how it might be maintained as a bill filed under the discretion of the trustee.

Ratification operating as an original command, the bill is well filed, and a decree of foreclosure may be drawn, unless within a short time the defendant company shall discharge both principal and interest of the mortgage debt.[102]

[102] Accord: Kelley v. Munson, 7 Mass. 319, 5 Am. Dec. 47 (1811). Dodge v. Hopkins, 14 Wis. 630 (1861), is the leading case for the doctrine that ratification by the principal will not bind the third person without a subsequent assent by him, because of want of mutuality. The principal before ratification being free to repudiate or to assent, the third person must be equally free, and cannot be bound by the unilateral act of the principal alone.

In England it has been held that the maxim of ratification holds. By ratification the agreement relates back and is the same as though it had been previously authorized, binding principal and third person alike. Bolton Partners v. Lambert, 58 L. J. Ch. 425, 41 Ch. D. 295, 60 L. T. Rep. 685, 37 W. R. 434 (1888).

In McClintock v. South Penn Oil Co., 146 Pa. 144, 23 Atl. 211, 28 Am. St. Rep. 785 (1892), a more equitable and practical rule was laid down. The Wisconsin case presses too far the doctrine of mutuality. In any contract there must be an interval between offer and acceptance when one party is bound and the other is free. The English rule presses the maxim too far. Ratification is not always the same in effect as a previous authorization. Substantial justice is done both parties if the third person may, up to the time of ratification, but not after, withdraw from his agreement. If he has not withdrawn, and the principal ratifies, the parties will then occupy the same position as though there had been previous authority. There are logical difficulties in

CHAPTER V

TERMINATION OF THE RELATION

SECTION 1.—BY ACT OF THE PARTIES

I. By Accomplishment of the Purpose

MOORE v. STONE.

(Supreme Court of Iowa, 1875. 40 Iowa, 259.)

Action to recover certain land which Moore claimed under a tax deed, and Stone by conveyance from one Scarlett. Scarlett had employed Moore to purchase the land and had paid him a commission for his services, after paying one-half the purchase price and receiving a contract for a deed upon payment of the balance. Later the vendor sent the deed to Moore to be delivered to Scarlett upon payment of the balance. Meantime Moore had purchased some thousands of acres of land at tax sale, including the land in question, but he had not noticed this fact, and of course did not mention it to Scarlett when later he delivered the deed. Defendant claimed Moore was his agent, and could not set up this deed against his principal. Decree for defendants.

Miller, C. J.[1] [After stating the facts:] * * * Upon these facts it is quite clear that the agency of the plaintiff, or of Moore & McIntire, for the purchase of the land for Scarlett, terminated at the time they delivered to him the written contract for a conveyance of the land on the receipt of the one-half of the purchase money, and the payment of their fees for the services performed. When this was accomplished Moore & McIntire had done all that they, or the plaintiff, had been employed to do. They had made the purchase as Scarlett had desired them to do, delivered to him the written contract sent to

any solution of this anomalous act, but practically this solution seems satisfactory. 62 Cent. Law J. 338. For a valuable discussion of the various rules, see the late case of Kline Bros. & Co. v. Royal Ins. Co. (C. C.) 192 Fed. 378, 386 (1911).

If the principal does not deny the authority of an agent to act for him, it will not, in general, lie in the mouth of any third persons to call in question the power of the agent. Scott v. Detroit Young Men's Society's Lessee, 1 Doug. 119 (1843); Rogers v. Kneeland, 10 Wend. 218 (1833); Leonard v. Mason, 69 Tenn. (1 Lea) 384 (1878).

[1] Part of the opinion is omitted.

them for Scarlett, received the first payment as per agreement. This completed the services they had undertaken.[2] Scarlett himself so regarded it, for when these things were done he inquired how much they charged him for their services, and on being informed as to the amount he paid the same. They had performed the business for which the agency had been constituted, and by operation of law the agency was terminated. See Story on Agency, § 499, and cases cited; 2 Kent's Com. *643, and cases cited. This was in July, 1868. The purchase of the land at tax sale by Moore & McIntire was not made until October of that year. At that time they were as free to purchase the same as any other persons. Their agency no longer existed; they had not undertaken to procure a good title for Scarlett, nor to examine the title for him. The land was situated in another county from where the plaintiff resided; nothing was said to them about the title, and they might well suppose that Scarlett, since he resided near the land and desired to buy it, had examined or procured some one to examine the records, in the county where the lands were situated.

It is also quite clear that the fact that the deed to Scarlett was sent by Everett to the banking house of Moore & McIntire, for the purpose of being delivered upon payment of the balance of the purchase money, did not operate to revive the prior agency for the purchase of the land. In this transaction Moore & McIntire acted for and as agents of the grantor in the deed. There is no evidence that Scarlett procured the plaintiff, or his firm, to obtain the deed for him. On the contrary it was sent by Everett to Moore & McIntire for the purpose of collecting the balance of the purchase money then due. They performed that service for Everett, and received their compensation from him.

It is equally clear that the plaintiff was not guilty of any fraud, in failing to disclose the fact of the tax purchase by Moore & McIntire. Their relations were not such as required such disclosure to be made, especially when it is affirmatively shown that they had no actual knowledge that they held the certificate of purchase at the time they delivered the deed to Scarlett.

The decree of the court below will be reversed, and a decree entered for plaintiff in this court if he so elects, or the cause will be remanded for a decree to be entered in conformity with this opinion by the district court.

Reversed.

[2] When an agent employed to sell land has found a purchaser upon the terms fixed by the principal he has fully performed his agency, and it is at an end. He is then at liberty to become the agent of the purchaser to see that the papers are properly prepared. The purpose of the agency having been fulfilled, the relation is ipso facto terminated. Short v. Millard, 68 Ill. 292 (1873). An act done by the agent after the full accomplishment of the agency purposes is done without authority. The accomplishment of the purpose terminates the agency. Tuite v. Wakelee, 19 Cal. 692 (1862). For a wrong committed by the agent after he has performed his employment the principal is not liable, for the relation of principal and agent no longer exists. Kingan & Co. v. Silvers, 13 Ind. App. 80, 37 N. E. 413 (1894), ante, p. 6.

MARBURY v. BARNET.

(Supreme Court of New York, Appellate Term, First Department, 1896. 17 Misc. Rep. 386, 40 N. Y. Supp. 76.)

McADAM, J. The action was to recover for services alleged to have been rendered by the plaintiff to the defendant under what upon their face are entitled "Articles of Agreement," made and entered into August 3, 1892. By these so-called "Articles," the defendant appoints the plaintiff his sole agent and attorney to represent his interests in the production and representation of an extravaganza called "1492," under an agreement between the defendant and one Edward E. Rice, dated July 26, 1892, and to collect and receive the royalties thereunder. For the services to be rendered, the defendant agrees to pay the plaintiff 8 per cent. of the sum or sums which the defendant may be entitled to under the agreement with Rice. The last-mentioned agreement was for three years from July 26, 1892, thus terminating, by its terms, July 26, 1895. On July 20, 1893, the contract between the defendant and Rice was extended for two years from July 26, 1895; and the plaintiff claims that such extension operated to extend the agreement between her and the defendant for a like period.

It is conceded that the defendant paid the plaintiff all the commissions earned under the so-called "articles" during the lifetime of the first agreement between the defendant and Rice. The suit was really to recover the commissions which would have accrued from August 3, 1895, to January 11, 1896, if the plaintiff's agreement had embraced that period. But it did not cover that period. It contemplated, at most, the existence of the agreement between the defendant and Rice to which it particularly refers, and terminated by "efflux of time and performance of the condition" (Dunl. Paley, Ag. 184); or, in other words, by the expiration of the period during which it was to exist and to have effect (Story, Ag. § 480). The minds of the plaintiff and defendant never met respecting the extended term, and it could not have been within their contemplation at the time, because it came into existence long after the power was given, and as the result of a new understanding, with which the plaintiff has no concern.

But, apart from this, the power seems one capable of revocation at any time by the donor. A letter of attorney depends, from its nature, on the will of the person making it, and may, in general, be recalled at his will; yet if he binds himself for a consideration in terms, or by the nature of his contract, not to change his will, or if the power be coupled with an interest, the law will not permit him to change it. Hunt v. Rousmanier's Adm'rs, 8 Wheat. at page 202, 5 L. Ed. 589; Story, Ag. § 463. To make the power irrevocable, there must be an interest in the subject of the agency itself, and not a mere interest in the result of the execution of the authority, such as arises from com-

pensation for executing the power. Mansfield v. Mansfield, 6 Conn. 559, 16 Am. Dec. 76; 1 Am. & Eng. Enc. Law (2d Ed.) p. 1216; Stier v. Insurance Co., 58 Fed. 843; Missouri v. Walker, 125 U. S. 339, 8 Sup. Ct. 929, 31 L. Ed. 769. So that, whether the plaintiff's power comprehended the extended agreement or not, the defendant had a right to revoke it, and effectually exercised the privilege before the period for which compensation is claimed by the plaintiff.

The "Articles of Agreement" upon which the plaintiff sues express no consideration, and the plaintiff in no manner obligates herself to serve thereunder for any specified time, unless it is to be inferred from the mere fact that the contract under which she was to collect the royalties extended to July 26, 1895. Even indulging this inference, which is the most favorable the plaintiff can demand, there is not the slightest ground for holding that her obligation extended beyond that period. If her duties ended at that time, so did the obligations of the defendant, and there is no theory upon which the alleged right of action can be sustained.[3] If the plaintiff's rights attached to the extension granted, they would continue to attach to every extension thereafter made, and cease only when the defendant and Rice severed their relations.

The action, though in form for services rendered, is in fact founded on readiness to perform, and in the nature of wrongful discharge. In whatever light the matter may be viewed, it is apparent that the complaint was properly dismissed, and, as a necessary sequence, the judgment must be affirmed.

II. Revocation by the Principal

(A) In General

BURKE v. PRIEST.

(Kansas City Court of Appeals, Missouri, 1892. 50 Mo. App. 310.)

Smith, P. J. The principle is rudimentary that as between principal and agent the authority of the latter is revocable at any time if not coupled with an interest.[4] The authority of the agent to represent the principal depends upon the will and license of the principal.

[3] An agreement made one Fischer the agent of plaintiffs until October 1, 1867. Sureties were therefore held liable for accounting by the agent for transactions before that date, but not for business intrusted to him after that time. Gundlach v. Fischer, 59 Ill. 172 (1871). Authority to an agent to receive produce before the first rise of the Ohio river carries no authority to receive it after the first rise. Longworth v. Conwell, 2 Blackf. 469 (1831). And when the agency is at will no rights can grow out of it after it has been terminated by either party. Willcox & Gibbs Sewing Machine Co. v. Ewing, 141 U. S. 627, 12 Sup. Ct. 94, 35 L. Ed. 882 (1891); Rhodes v. Forwood, 47 L. J. Ex. 396, 1 App. Cas. 256, 34 L. T. 890, 24 W. R. 1078 (1876).

[4] Accord: Rochester v. Whitehouse, 15 N. H. 468 (1844), quoting Story on Agency, § 463.

It is the act of the principal which creates the authority; it is for his benefit and to subserve his purposes that it is called into being; and, unless the agent has acquired with the authority an interest in the subject-matter, it is in the principal's interest alone that the authority is to be exercised. The agent has no right to insist upon a further execution of the authority if the principal desires it to terminate. It is a general rule that as between principal and agent the authority of the latter may be revoked by the former at his will at any time and with or without reason therefor, except where the agent's authority is coupled with an interest. Mechem on Agency, § 204; State ex rel. Walker v. Walker, 88 Mo. 279; Hunt v. Rousmanier, 8 Wheat. 201, 5 L. Ed. 589, post, p. 274.

The exceptions to the general rule just stated is where the power is given as a part of a security or for a valuable consideration, or where the power is coupled with an interest. But the interest in such cases is an interest in the subject-matter on which the power is to be exercised. An interest in that which is produced by the exercise of the power is not sufficient. The power must be engrafted on an interest in the property on which the power is to be exercised, and not an interest in the money derived from the exercise of the power. Hunt v. Rousmanier, supra; Barr v. Schroeder, 32 Cal. 609; Coffin v. Landis, 46 Pa. 431; Blackstone v. Buttermore, 53 Pa. 266, post, p. 214. And so it has been held that a power to collect money and receive property and to sell and convey the property of the principal, the agent to receive one-half of the net proceeds as compensation, is not a power coupled with an interest and is revocable. Hartley's Appeal, 53 Pa. 212, 91 Am. Dec. 207, post, p. 226.

In this case, the defendants who had lately been copartners, engaged in the practice of medicine, entered into a parol contract with plaintiff who was an attorney, whereby it was agreed that the defendants would turn over to plaintiff their books of account for collection and adjustment, and for which the former would pay the latter as a compensation for his services ten per cent. on all sums collected, and five per cent. on all accounts adjusted by note. The defendants refused to deliver their books of account to plaintiff, and so did not carry out the contract. This the defendants could do, and on account of which the plaintiff has no legal ground of complaint.

Of course, where the principal has the power to revoke the authority of the agent, he may, nevertheless, subject himself to a claim for damages if he exercise such power contrary to his agreement.

The evidence does not show that the plaintiff's employment was fixed for any period of duration. The written admission of one of the defendants offered in evidence by plaintiff showed no more than that plaintiff was to "try and have all notes and accounts adjusted in eighteen months." The duration of the contract was contingent and uncertain. It might have been performed by plaintiff in a week, a month

or year. So it has been held that an appointment of an agent to do certain acts during a given period does not, of itself, amount to an agreement that he should be permitted to continue to act during that period. Mechem on Ag., § 211. In any view which we have been able to take of the case, we are unable to find that the court below erred in sustaining the demurrer to the plaintiff's evidence.

It follows, therefore, that the judgment will be affirmed. All concur.

BROOKSHIRE v. VONCANNON.

(Supreme Court of North Carolina, 1845. 28 N. C. [6 Ired.] 231.)

Defendant in right of his wife, and plaintiff in his own right, were entitled to a share of the personal estate of one Clark who had died intestate in Alabama. Defendant by power of attorney authorized plaintiff to receive his share of the estate and bring it home. Plaintiff made one trip which resulted in nothing, whereupon defendant revoked his authority. He made a second trip, and now seeks, according to the terms of the power of attorney, to recover one-sixth of his expenses and ten per cent. for his time and trouble. The court charged that such agreement to pay made the power irrevocable. Judgment for plaintiff for more than one-sixth of his expenses on the first trip, and defendant appeals.

DANIEL, J. The charge of the judge was, as we understand it, in conformity to the prayer of the plaintiff's counsel; and, received in that light, we think that it was erroneous. A power of attorney, or other authority, is in general revocable from its nature; and the power of revoking an authority may be exercised at any moment before the actual execution of it. Paley on Agency, 184, 185. Even if it be true at law, that a power, which is part of a security for money, or coupled with an interest, cannot be revoked, yet the doctrine has no application to this case. The plaintiff, neither when the power was given to him, nor when the defendant contended that it was revoked, had any interest in the distributive share of the defendant. If he did the labor, he was then to be compensated as above mentioned; but there was no obligation on the plaintiff to go to the West for the property, and when the defendant insisted, that he had made the revocation, the plaintiff had never received any of the said property. We think that there must be a new trial.

PER CURIAM. Judgment reversed, and venire de novo.

MacGREGOR v. GARDNER.

(Supreme Court of Iowa, 1862. 14 Iowa, 326.)

Suit to set aside certain deeds made by Alexander MacGregor, as attorney of James MacGregor, to George D. and Egbert Gardner. James claimed that the lands conveyed were purchased with his money and for his use, and the deeds were without consideration and for a fraudulent purpose. He prays that the same may be canceled and declared void. Alexander claims that the lands were purchased for his use, the titles being in James because Alexander was then involved and could not hold property in his own name, that $2,000 of the purchase money was a trust fund belonging to his wife and children, and that he deeded the lands under an irrevocable power of attorney to the Gardners to be held in trust for these beneficiaries. Decree for plaintiff.

BALDWIN, J.[5] * * * The mere fact that the power of attorney is itself declared irrevocable does not prohibit its revocation, nor does it establish the fact that the person making the same yields all right or claim to the property authorized to be sold, or that the person upon whom such power is conferred has the right to sell and dispose of the property entrusted to his care, without consideration, or without being held accountable for the faithful discharge of his trust. "The general rule is," says Story on Agency, par. 476, "that the principal may revoke the authority of his agent at his mere pleasure. But this is open to some exceptions, which, however, are entirely consistent with the reason upon which the general rule is founded. One exception is when the principal has expressly stipulated that the authority shall be irrevocable and the agent has an interest in its execution. Both of these circumstances must concur, for although in its terms an authority may be expressly declared to be irrevocable, yet if the agent has no interest in its execution, and there is no valid consideration, it is treated as a mere nude pact and is deemed in law to be revocable, upon the general principle that he who alone has an interest in the execution of an act is also entitled to control it."

The use of the word "irrevocable" alone is not evidence that the power is coupled with an interest; if so, it would not be necessary that both of these circumstances should concur. The powers of attorney under which these deeds were made read as follows: "Know all men by these presents, that I, James MacGregor, Jr., &c, being seized in fee of certain lands in the county of Clayton, Iowa, have nominated, constituted and appointed Alex. MacGregor * * * my true and lawful attorney, irrevocable, for me, and my name to lease,

[5] The portions of the opinion dealing with the contention that there was a trust are omitted. Lowe, J., dissented. Accord: Walker v. Denison, 86 Ill. 142 (1877).

devise and sell said lands * * * to such person or persons, upon such terms, * * * and for such prices as he may see fit."

The word "irrevocable" signifies, not to be recalled or revoked. Therefore, when used in the above connection it shows, that it was the intention of the principal that the authority thereby conferred, should not be recalled. It cannot however, be inferred from its use that the agent was thereby invested with any greater power of disposition or authority in relation to the property to be sold, than if this word had been omitted. But it is not the policy of the law to deny to the person making such powers irrevocable the right to revoke such authority, notwithstanding the fact that it was the fixed design of the parties so to do when they were made. If, however, the power is coupled with an interest, or the agent is interested in its execution, it shall not be revoked.

Conceding, therefore, that the power is by its terms made irrevocable, and when the agent has an interest in its execution, the law declares that it then cannot be revoked, this fact still does not of itself give the agent any power to dispose of the property, except in the manner directed by the principal. The authority is continuous, but in other respects the same as if revocable. If the agent therefore exceeds his authority or abuses the trust reposed, equity will afford the principal the proper relief. Alexander had no authority conferred upon him to dispose of the lands without consideration. He was required to act for the best interest of the principal, and granting that he had an interest in the execution of the authority conferred, he could not dispose of the property of which he had the sale, in such a manner as the title would inure to his benefit, for the rule of equity is, that a purchase by an agent of the property of which he has the sale, or in which he represents another, whether he has an interest in it or not, per interpositam personam, carries fraud on the face of it. * * *

Decree as to the deeds affirmed.

BLACKSTONE v. BUTTERMORE.

(Supreme Court of Pennsylvania, 1867. 53 Pa. 266.)

Ejectment by Blackstone. Buttermore, being the owner of the land in question, gave to one Davidson a power of attorney to sell it for $25,000 on stated terms, concluding: "And I hereby ratify and confirm whatever contract he may make in accordance with the above authority, and hereby bind myself for its execution. This authority is irrevocable before the 1st of May next." Davidson on April 19 contracted with Blackstone for the sale of the land. There was evidence that Buttermore had meantime revoked the power, and that Blackstone had notice of the revocation before contracting with Davidson. Verdict for defendant, and plaintiff brings error.

AGNEW, J. We have decided the substantial point in this case at

the present term upon the appeal of Hartley & Minor from the Orphans' Court of Greene county, opinion by Thompson, J. 53 Pa. 212, 91 Am. Dec. 207, post, p. 226.

A power of attorney constituting a mere agency is always revocable. It is only when coupled with an interest in the thing itself or the estate which is the subject of the power, it is deemed to be irrevocable, as where it is a security for money advanced or is to be used as a means of effectuating a purpose necessary to protect the rights of the agent or others. A mere power like a will is in its very nature revocable when it concerns the interest of the principal alone, and in such case even an express declaration of irrevocability will not prevent revocation.[6] An interest in the proceeds to arise as mere compensation for the service of executing the power will not make the power irrevocable. Therefore, it has been held that a mere employment to transact the business of the principal is not irrevocable without an express covenant founded on sufficient consideration, notwithstanding the compensation of the agent is to result from the business to be performed and to be measured by its extent. Coffin v. Landis, 46 Pa. 426. In order to make an agreement for irrevocability contained in a power to transact business for the benefit of the principal binding on him, there must be a consideration for it independent of the compensation to be rendered for the services to be performed.

In this case the object of the principal was to make sale solely for his own benefit. The agreement to give his agent a certain sum and portion of the proceeds was merely to carry out his purpose to sell. But what obligation was there upon him to sell, or what other interest beside his own was to be secured by the sale? Surely his determination to sell for his own ends alone was revocable. If the reasons for making a sale had ceased to exist, or he should find a sale injurious to his interest, who had a right to say he should not change his mind? The interest of the agent was only in his compensation for selling, and without a sale this is not earned. A revocation could not injure him. If he had expended money, time or labor, or all, upon the business intrusted to him, the power itself was a request to do so, and on a revocation would leave the principal liable to him on his implied assumpsit. But it would be the height of injustice if the power should be held to be irrevocable merely to secure the agent for his outlay or his services rendered before a sale. The following authorities are referred to: Hunt v. Rousmanier, 8 Wheat. 174, 5 L. Ed. 589; Story on Agency, §§ 463, 464, 465, 468, 476, 477; Paley on Agency, 155; 1 Parsons on Contracts, 59; Irwin v. Workman, 3 Watts, 357; Smyth v. Craig, 3 Watts & S. 20.

The judgment is therefore affirmed.

[6] That a power of attorney is in terms made "exclusive" or "irrevocable" does not prevent the principal from revoking it at his own pleasure. Kolb v. Bennett Land Co., 74 Miss. 567, 21 South. 233 (1896); Chambers v. Seay, 73 Ala. 372 (1882).

(B) Power Given for a Consideration, or as Security

WALSH v. WHITCOMB.

(Nisi Prius, King's Bench, 1797. 2 Espinasse, 565.)

Assumpsit to recover money for work done by Walsh, a tailor. Defense that Walsh having become insolvent had executed a power of attorney to one Barker, together with a general assignment by deed, authorizing him to receive all debts due Walsh and give proper receipts; also to appoint a substitute to act in his room for the same purposes. Barker appointed Hindley, who received from Whitcomb the debt in question, giving him a receipt. Plaintiff claimed to have revoked the power to Barker by the appointment of another agent.

Lord KENYON. There is a difference in cases of powers of attorney; in general they are revocable from their nature; but there are these exceptions: Where a power of attorney is part of a security for money, there it is not revocable; where a power of attorney was made to levy fine, as part of a security, it was held not to be revocable; the principle is applicable to every case where a power of attorney is necessary to effectuate any security; such is not revocable. In the present case Walsh assigned all his effects, &c., over to Barker, to whom, amongst others, he was indebted; the power of attorney was made to Barker to call in the debts for the benefit of the creditors; it was part of the security for the payment of the creditors. It was therefore by law not revocable; and the payment by the defendant is good.

The jury found a verdict for the defendant.

PARKE v. FRANK.

(Supreme Court of California, 1888. 75 Cal. 364, 17 Pac. 427.)

Action for damages for breach of a contract of agency. Berry and Place were agents in California for machinery manufactured by Frank. They sold the agency to Parke and Lacy on the condition that Frank would approve. He did approve, whereupon Parke and Lacy paid Berry and Place $2,400 for the agency. There was trouble in drawing an agency agreement between Frank and plaintiffs, and Frank took away the California agency, giving it to Gregory & Co. From judgment for plaintiffs defendant appeals.

MCKINSTRY, J.[7] The main contention of the appellant in the court below was that the contract of agency, not being for any definite term, was revocable at the will of the principal. Appellant claims that the rulings of the superior court alleged to be erroneous are exemplified by the portion of its charge to the jury which reads:

[7] Part of the opinion is omitted.

"No period of time was mentioned. * * * Where employment is proved, and no time is specified, the law presumes it shall last and endure for a reasonable time. What would be a reasonable time is a question for you to determine;" and by the refusal of the court, on request of defendant, to charge: "If the jury believe, from the evidence, that no definite time was agreed upon between plaintiffs and defendant for the contract of agency to endure, then said contract could be terminated by either party thereto, at his option, at any time."

The Civil Code provides: "Unless the power of an agent is coupled with an interest in the subject of the agency, it is terminated, as to every person having notice thereof, by its revocation by the principal." Section 2356. The interest which can protect a power after the death of the person who creates it must be an interest in the thing itself, and not an interest in that which is produced by the exercise of the power. Hunt v. Rousmanier, 8 Wheat. 174, 5 L. Ed. 589. It may be conceded that, by the section of the Civil Code, a revocation by the principal terminates the agency in every case where his death terminates it, and that the plaintiffs herein had no such interest in the subject of the agency as rendered the agency irrevocable. Nevertheless, if, for a valuable consideration, the defendant agreed not to revoke the agency for a reasonable time, and in view of the circumstances and nature of the contract a reasonable time could be ascertained, he had no legal right to revoke it during such time. "Although a letter of attorney depends, from its nature, on the will of the person making it, and may, in general, be recalled at his will, yet if he binds himself for a consideration, in terms, or by the nature of his contract, not to change his will, the law will not permit him to change it." Hunt v. Rousmanier, 8 Wheat. 203, 5 L. Ed. 589. In such case, if he fails to comply with his contract, he becomes liable to the agent as such.

Even if, however, it should be conceded that, under the Code, the principal retains the right to revoke a power, at his option, in every case where the agent is not vested with an interest in the subject of the agency, this would not render illegal a collateral agreement whereby the principal should agree, for a consideration, not to exercise the power for a definite period, or for a reasonable time ascertainable.[8] In case of such an agreement, if the agency is revoked by

[8] An agency created upon a valuable consideration, or as a security, is not to be confused with a power coupled with an interest. Bonney v. Smith, 17 Ill. 531 (1856); Buffalo Land & Exploration Co. v. Strong, 91 Minn. 84, 97 N. W. 575 (1903). The former is revoked by the death of the principal, the latter is not. Hunt v. Rousmanier, 8 Wheat. 174, 5 L. Ed. 589 (1823), post, p. 274. The two are often spoken of as though they were identical. Carmichael's Case, 65 L. J. Ch. 902, 2 Ch. 643, 75 L. T. 45 (1896), in which Lindley, L. J., quotes from Clerk v. Laurie, 2 H. & N. 199 (1857). "What is meant by an authority coupled with an interest being irrevocable is this—that where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of receiving some benefit to the donee of the authority, such an authority is irrevocable." In Barr v. Schroeder, 32 Cal. 609 (1867), the court holds that, though the power be not coupled with an interest,

the principal, and the agent is thereby deprived of authority further to act as such, the principal is liable in damages by reason of the breach of his promise not to recall the agency. Whether, therefore, it be considered that the defendant violated his contract by refusing to make consignments to the plaintiffs, or violated it by revoking the agency, he would be liable upon proper pleading. And in each case the rule of damages would be the same, that is, the plaintiffs would be entitled to recover the direct or approximate damages sustained by reason of defendant's depriving them of the benefits of the agency.

The court below did not err in refusing to give the instruction asked by defendant, because that instruction ignores all evidence tending to show that the defendant agreed not to revoke the agency. But the instruction given, while abstractly correct, suggests that, independent of any express promise or implied promise arising out of the nature of the contract, the defendant had no legal right to put an end to the agency until the expiration of a "reasonable time." * * *

[The court held that, even though under the California Code the agency for a consideration could be revoked, the principal is nevertheless liable in damages by reason of his breach of his promise not to recall the agency.] Reversed and remanded for a new trial because of error in fixing the amount of the damages.

(C) Power Coupled with an Interest

MONTAGUE v. McCARROLL.

(Supreme Court of Utah, 1897. 15 Utah, 318, 49 Pac. 418.)

Action to quiet title to 20 acres of land which Montague claimed under a quitclaim deed from Adolph Hankammer, by Jos. C. Hemingray, attorney in fact. McCarroll offered in evidence an earlier deed from Hankammer to one Ryan, who conveyed to defendant. The deed contained a revocation of Hemingray's power of attorney. The land had been patented by Hankammer under act of Congress granting additional land to soldiers and sailors. From judgment for plaintiff defendant appeals.

MINER, J.[9] * * *. Adolph Hankammer, owning the right to enter land under section 2306, Rev. St., made an irrevocable power of attorney to Hemingray to enter upon and take possession of the

still, if it is given as security for the payment of money, whether it be expressly stated in the agreement, or the intent be shown by the nature of the contract, the principal will not be permitted to revoke it, either directly or indirectly, except upon payment of the money intended to be secured.

To permit a party to render ineffectual a security so created would be against the clearest principles of equity and justice. Evans v. Fearne, 16 Ala. 689, 50 Am. Dec. 197 (1849), quoting Story on Agency, § 477.

[9] Part of the opinion is omitted.

land in question, and in consideration of five dollars, paid by the attorney, he was irrevocably vested with power to grant, bargain, sell, lease, convey, and confirm the same to the purchaser, and deliver a deed of conveyance thereof. Hankammer forever renounced all right in, and to revoke, any of said powers, or to appoint any other person to execute the same, and forever renounced all right on his part to do what the attorney was authorized to do, and released to the attorney all claims to any of the proceeds of sale, and ratified the acts of the attorney as absolute, both in conveying and retaining the proceeds of the sale of the land. This power of attorney not only carried with it an assignment of the interest of Hankammer in the land to Hemingray, but vested in him the legal right to convey the title. It was a power coupled with an interest. It was valid as against Hankammer, his heirs, assigns, and grantees. The proceeds of the sale of the land were vested in the attorney, and renounced by the principal. In consideration of five dollars, paid to Hankammer by Hemingray, Hankammer expressly renounced not only the proceeds of the sale of the land, but all power and authority over the property, expressly confirming what should be done by the attorney, and made the act irrevocable. This power was irrevocably vested in the attorney until exercised. The power was exercised when the conveyance was made to the plaintiff. By that act and deed all right, title, and interest in the property was vested in Montague. The conveyance by Hankammer to the defendant's predecessor in interest, as well as the attempted revocation of the power of attorney to Hemingray, were inoperative and ineffectual either to pass the title or revoke the power. Hankammer had parted with his interest before he executed the deed to Ryan, through whom the defendant obtained title, and he had no power to revoke the authority embraced in the power of attorney.

While a power of attorney, by its terms, may be expressly declared to be irrevocable, yet if the agent has no interest in its execution, and there is no valid consideration for it, it is treated as a mere nude pact, and is deemed in law to be revocable, upon the general principle that he alone who has an interest in the execution of an act is also entitled to control it. But, where the power is coupled with an interest, or where it is given for a valuable consideration, unless there is an express stipulation that it shall be revocable, it is from its character, in contemplation of law, irrevocable, whether terms expressly making it so are expressed in it or not. In this case the power became a part of the contract, coupled with a valid consideration. It therefore became irrevocable, and the attempted revocation, as well as the deeds to those through whom defendant derived his title, are wholly insufficient to vest any title in the defendant. Mechem, Ag. §§ 205, 206; Story, Ag. § 477; Hunt v. Rousmanier's Adm'rs, 8 Wheat. 174, 5 L. Ed. 589; Barnes v. Poirier, 12 C. C. A. 9, 64 Fed. 14; Webster v. Luther, 163 U. S. 331, 16 Sup. Ct. 963, 41 L. Ed. 179.

The court below held correctly that the legal title to the property

was vested in the plaintiff. This conclusion being reached, it is unnecessary to discuss any other errors. The judgment of the district court is affirmed, with costs.

TERWILLIGER v. ONTARIO, C. & S. R. CO.

(Court of Appeals of New York, 1896. 149 N. Y. 86, 43 N. E. 432.)

Action for the price of 1,224 railroad ties cut on plaintiff's land and sold to defendant. The latter claimed plaintiff had authorized one Wheeler to sell the ties and receive the pay therefor, and that it had paid Wheeler in full. Plaintiff denied Wheeler's authority. Appeal from a judgment in favor of plaintiff.

ANDREWS, C. J.[10] The principal question on this appeal arises on the exception by the defendant to the refusal of the referee to make any finding upon the question whether the plaintiff, in the summer of 1889, authorized Wheeler to sell the ties to the defendant, and apply the proceeds of the sale in payment for the timber which had been cut by the plaintiff, without authority, from Wheeler's lands. The evidence upon this question was conflicting. The defense rested substantially upon the assertion that such authority was given; that it was executed by a sale and delivery of the ties thereunder by Wheeler to the defendant; and that, the defendant having subsequently paid Wheeler therefor, the debt was discharged. The refusal of the referee to pass upon the question of Wheeler's original authority was put upon the ground that, assuming it to have been given, it was subsequently revoked by the act of the plaintiff in himself selling and delivering the ties to the defendant. It became, therefore, as the referee held, an immaterial issue, which, if found in favor of the defendant, would not affect the result, since, by the general rule, an authority once given, if revoked before execution, except where an element of estoppel intervenes, is the same as to third persons as though it had never existed.

The primary question presented by this ruling of the referee involves an inquiry into the nature of the authority given by the plaintiff to Wheeler. It is to be conceded, for the purpose of this appeal, that Wheeler possessed the authority which the evidence on the part of the defendant tended to establish, and that it was conferred for the purposes which, by direct evidence or by fair inference, can be collected from the evidence most favorable to the defendant. If the authority conferred on Wheeler was a mere naked authority, by which we understand an authority in the execution of which the agent has no other interest than that which springs from his employment as agent and his right to earn his compensation, then, according to the general rule, it was, while executory, revocable at any

[10] Part of the opinion is omitted.

time, at the pleasure of the plaintiff. In case of a naked power, the authority of the agent, derivative, and not original, ceases when the principal, for whatever reason, withdraws the delegation, and terminates the agency. There is a qualification of the rule where the agent has entered upon the execution of the authority before revocation, and has so bound himself that a retraction of the authority would subject him to liability. In such cases the principal cannot revoke the authority as to the part of the transaction remaining unexecuted, at least not without indemnifying the agent. Gelpcke v. Quentell, 74 N. Y. 599; Hodgson v. Anderson, 3 Barn. & C. 842; Blasco v. Fletcher, 14 C. B. (N. S.) 147; Goodwin v. Bowden, 54 Me. 424.

But an authority may be irrevocable by reason of its purpose and the circumstances attending its creation. The cases of an authority coupled with an interest are of this character. What constitutes an authority coupled with an interest was considered in one of the masterly judgments of Chief Justice Marshall, in Hunt v. Rousmanier, 8 Wheat. 174, 5 L. Ed. 589, post, p. 274. In that case the owner of an interest in a certain vessel, then at sea, to secure a loan of money, executed to the lender contemporaneously with the loan a power of attorney authorizing him to sell the borrower's interest in the vessel, which power, by its terms, was to become void on payment of the loan. The borrower died before payment, and the question was presented whether his death operated to revoke the power. It was decided that the power was revoked by the death of the grantor. The general doctrine that a power must be exercised in the name of the principal, and does not survive his death, was held to be applicable. But the court, in the decision of the question, proceeded to consider the exception to the rule in cases where the power was coupled with an interest, and to define the meaning of that phrase. In a luminous statement the chief justice confined the scope of the exception to cases where, together with the power, there was vested in the donee an estate, right, or interest in the subject of the power, as distinguished from an interest in the proceeds of the power when exercised. In the former case he declared that the power would not be extinguished by the death of the creator of the power, because it attached to the estate of the donee in the subject of the power, and was capable of execution in his own name after the death of the principal, unlike cases where the power was unconnected with any interest in the thing itself, and the only interest was in the execution of the power. The distinction between the cases of a power given for the purpose of security and a power given for the same purpose, but supplemented by a transfer of an interest, seems technical; but in the latter case it at least preserves the substance and effectuates the intent, while it obviates in the particular case the general doctrine that a power is determined by the death of the creator of the power.

In Watson v. King, 4 Camp. 272, Lord Ellenborough, in a case very similar to that of Hunt v. Rousmanier, also held that a power of attorney to a creditor to sell a vessel was revoked by the death of the principal, and upon the same ground, namely, that it could not thereafter be executed in his name. The same point was ruled in equity in Lepard v. Vernon, 2 Ves. & B. 51, where it was held that a power given to a creditor to receive a debt, expressly for the purpose of liquidating the claim, unaccompanied, however, by any assignment of the debt, was revoked by the death of the principal. Knapp v. Alvord, 10 Paige, 205, 40 Am. Dec. 241, is an illustration of a power coupled with an interest. There a power of attorney to sell a stock of goods and apply the proceeds upon liabilities incurred and to be incurred by the donee of the power was given, accompanied by the possession of the goods, and it was held that it was not revoked by the death of the principal, because it was a power coupled with an interest. The fact that the possession of the goods accompanied the power was the controlling point in the decision. Testamentary powers, from their nature, necessarily survive the death of the testator. They usually accompany some estate given by the will to the donee of the power, or are regarded as trusts, which, if accepted, the donee is in conscience bound to execute. See Franklin v. Osgood, 14 Johns. 527.

There are other familiar cases of irrevocable powers, because coupled with an interest, such as powers of sale accompanying mortgages, or powers to do other acts affecting real or personal property, to make effectual an interest or right in the subject of the power vested in the donee, and to which the power is auxiliary.[11] Powers of this character are neither revocable by the grantor of the power, nor are they revoked by his death. Bergen v. Bennett, 1 Caines, Cas. 1, 2 Am. Dec. 281. Chief Justice Marshall's definition of a power coupled with an interest has been generally accepted in this country, but in some cases his classification has not been accurately observed. See Hutchins v. Hebbard, 34 N. Y. 24. Indeed, the English courts gave a wider meaning to the phrase than in the close definition of Chief Justice Marshall. In Watson v. King, supra, Lord Ellenborough speaks of the power in that case as a power coupled with an interest, and in Smart v. Sandars, 5 C. B. 895, Wilde, C. J., referring to the authorities, said: "The result seems to be that, where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable. This is what is usually meant by an authority coupled with an in-

[11] A power coupled with an interest is created when a landlord, having an interest in certain crops, and being indebted to the tenant, authorized the tenant to sell the crops and reimburse himself. Such a power cannot be revoked by the landlord. Big Four Wilmington Coal Co. v. Wren, 115 Ill. App. 331 (1904).

terest." The distinction between the English and American cases is rather in words than substance. Upon the same facts the decisions in both judicatures are the same. Both in Hunt v. Rousmanier and Watson v. King the death of the principal was held to revoke the power, although in one case it was regarded as a power coupled with an interest, and in the other that it was not.

But there are classes of powers which are irrevocable by the act of the principal, although they do not come within Chief Justice Marshall's definition of powers coupled with an interest. This is clearly recognized by that eminent judge in the case to which reference has been made. After stating the general rule that a power may at any time be revoked by the party conferring it, he says: "But this general rule, which results from the nature of the act, has sustained some modification. Where a letter of attorney forms part of a contract, and is security for money, or for the performance of any act which is deemed valuable, it is generally made irrevocable in terms, or, if not so, is deemed irrevocable in law;" and he proceeds to state that the power to sell the vessel by Rousmanier in that case could not have been revoked by him during his life, but, not being a power coupled with an interest, it was revoked by his death. Kent uses similar language. He says (2 Kent, Comm. 644): "But where it [power of attorney] constitutes part of a security for money, or is necessary to give effect to such security, or where it is given for a valuable consideration, it is not revocable by the party himself, though it is necessarily revoked by his death." And Story, in his work on Bailment (section 209), says: "But if it is given as part of a security, as if a letter of attorney is given to collect a debt as a security for money advanced, it is irrevocable by the party." This doctrine has support in adjudged cases. Hunt v. Rousmanier, supra; Walsh v. Whitcomb, 2 Esp. 566; Gaussen v. Morton, 10 Barn. & C. 731; Hutchins v. Hebbard, supra; Wilde, C. J., Smart v. Sandars, supra; Raymond v. Squire, 11 Johns. 47. * * *

The oral authority given by the plaintiff to Wheeler to sell the ties (which must here be assumed), if it were a naked power, was not so far executed at the time of the alleged revocation that the right to revoke it had been lost. The verbal contract, which before that time had been entered into between Wheeler and the defendant for the sale of the ties, was not binding upon either party. The contract was for the sale of chattels exceeding $50 in value, and, while the terms of the sale were definitely fixed, there was neither writing, delivery, nor part payment, so as to take the contract out of the statute. The plaintiff was not bound to complete the sale (Farmer v. Robinson, 2 Camp. 339, note; Reed v. Latham, 40 Conn. 452), and as between himself and Wheeler he could revoke the authority of the latter (if a mere naked power), since the contract entered into by the agreement had not been so far executed as to subject him to

any liability. If the authority to Wheeler was irrevocable, it was because of the nature, consideration, and purpose for which the agency was constituted. Unless there was a consideration for the authority conferred on Wheeler to sell the ties and apply the proceeds on his claim, it is plain that it was not irrevocable. Raleigh v. Atkinson, 6 Mees. & W. 670. Without going into particulars, it is sufficient to say that the evidence given on the part of the defendant would, in our opinion, justify an inference that Wheeler accepted the arrangement proposed by the plaintiff, and forbore the pursuit of his lumber or its proceeds, in reliance upon the authority given him by the plaintiff to sell the ties, and apply the proceeds on his claim.

The position of an agent holding an irrevocable power for the sale of chattels, not connected with possession of the property or any interest in the nature of a title, general or special, in the subject of the power, is peculiar. The power usually given as a security has some analogy to a pledge or lien, although distinct from either. It bears a closer resemblance to the hypothecation of the Roman law, where, by force of the contract, without any transfer of possession, a right attaches to the property in the person to whom the hypothecation is made. But unlike the case of an hypothecation, the attorney, where no estate or possession passes with the power, has only a contract right. The fact that possession does not go with the power subjects the holder of the power to the risk that the purpose of the power may be frustrated by a transfer by the owner of the chattels to a purchaser in good faith for value without notice.

It will be for the court or jury on a new trial to determine, upon the facts found, whether there was any valid consideration within the law applicable to executory contracts to uphold the authority. If such consideration existed, then we are of the opinion that the authority was irrevocable, and that the payment by the defendant to Wheeler, under the contract made with him, was binding upon the plaintiff. In our opinion, the referee erred in refusing to find upon the question of authority in Wheeler to sell the ties and apply the proceeds on his claim. If no such authority existed, there is no defense to the action. If it was given, but was not based upon any consideration which the law deems sufficient to uphold an executory contract, then we are of opinion that it was revocable, and that it was a question of fact upon the evidence whether there was an actual revocation before the defendant paid Wheeler.

The judgment should be reversed, and a new trial ordered.

TAYLOR v. BURNS et al.

(Supreme Court of Arizona, 1904. 8 Ariz. 463, 76 Pac. 623.)

Suit to quiet title to three mining claims located by Burns, who sold one-fourth interest to one Duncan. On March 9, 1903, Burns and Duncan contracted for the sale of the claims with Kaufman, as trustee. Taylor bases his claim on an agreement made with Burns March 26, 1901. Judgment for defendants.

SLOAN, J.[12] [After stating the facts:] * * * Taking the instrument as a whole, it appears that it was intended merely as a power of attorney authorizing Taylor to effect a sale of the mines, upon the terms mentioned, as the agent of Burns. Nor is this power of attorney one which, in legal effect, can be construed as being coupled with an interest in the mining claims, so that it could not be revoked. There is nothing in the instrument which evidences an intention that Taylor should acquire an interest in the premises pending a sale of the same. Mention of future labor as part consideration is of no avail as conferring an interest, for it fails to bind Taylor to perform any work; nor does it state by whom this labor was to be performed, when it was to be done, or of what it should consist. It is not even provided that Taylor should have any right of possession during the pendency of the sale, or should pay any of the expense of the annual labor required by law. Manifestly the only interest which Taylor acquired under the agreement was the contingent one of sharing in the proceeds of the sale in case he should effect it. The interest which will render the power of attorney irrevocable must be in the subject of the power, and not pertain to the power itself.

As we have said, there is nothing in the instrument, taken as a whole, which gave Taylor any interest in the mining claims. He did not have the right of possession. His sole interest related to the consideration or proceeds to be derived from the sale. His power or agency was not, therefore, in legal contemplation, one coupled with an interest. In the case of Trickey v. Crowe, 8 Ariz. 176, 71 Pac. 968, this court declared, in speaking of a power of attorney coupled with an interest, that by "such interest is not meant an interest in that which is produced by the exercise of power, but it must be an interest in the property on which the power is to operate"; and further, that "the authority to sell on commission is not an authority coupled with an interest." [13]

We hold, therefore, that the agreement did not confer any title to

[12] Another portion of this opinion is found on p. 12.

[13] A pledge of property, accompanied by an irrevocable agency, is a power coupled with an interest. Miller v. Home Ins. Co., 71 N. J. Law, 175, 58 Atl. 98 (1904).

or estate in the mines in question upon Taylor, and that the findings and decree of the trial court are correct. The judgment will be affirmed.

Appeal of HARTLEY et al.

(Supreme Court of Pennsylvania, 1866. 53 Pa. 212, 91 Am. Dec. 207.)

Hannah D. Gallion on June 30, 1866, appointed Hartley and Minor attorneys to collect and receive all money and property coming to her as heir of John Douglass. July 20, 1866, she gave another power to one Howland in which she revoked the former power. September 29, 1866, Hartley and Minor petitioned the Orphans' Court for a citation to the administrator of Douglass to settle his account. The petition was dismissed, and Hartley and Minor appeal.

THOMPSON, J. There was no error committed by the court below in holding the power of attorney of Hannah Gallion to the appellants to be revocable. It was an ordinary agency, constituted by letter of attorney, to act for her to enforce a settlement of his accounts by the administrator of her father's estate, in which she was interested, and to collect any moneys or property that might belong, or be coming to her. For these services the attorneys were to have one-half of the net proceeds of what they might receive or recover for her.[14] The plaintiffs in error suppose that this clause rendered the power irrevocable by their principal, under the idea that it was a power coupled with an interest. This was a mistake, as all the authorities show. To impart an irrevocable quality to a power of attorney in the absence of any express stipulation, and as the result of legal principles alone, there must co-exist with the power an interest in the thing or estate to be disposed of or managed under the power.

An instance of frequent occurrence in practice may be given of the assignment of vessels at sea, with a power to sell for the benefit of the holder of the power, or of anybody else who may have advanced money and who it was agreed should be secured in that way. So where security has been transferred with a power to sell, and generally, I presume, in all cases of property pledged for the security of money where there is an accompanying authority to sell to reimburse the lender or creditor. In Hunt v. Rousmanier, 8 Wheat. 174, 5 L. Ed. 589, this doctrine is clearly and fully elucidated in the opinion of Marshall, C. J. In Bancroft v. Ashhurst, 2 Grant Cas. 513, a case tried at Nisi Prius before me, at which my brethren sat as adsessors, there is a pretty full examination of the question herein involved, and all the authorities referred to, and the conclusion is fully in accordance with Hunt v. Rousmanier, and sustains the above view of a power coupled with an interest.

[14] Authority to sell property and take as compensation a per cent. of the proceeds is revocable. State ex rel. Walker v. Walker, 88 Mo. 279 (1885); Marbury v. Barnet, 17 Misc. Rep. 386, 40 N. Y. Supp. 76 (1896).

In the case in hand the power and the interest could not co-exist. The interest the appellants would have would be in the net proceeds collected under the power, and the exercise of the power to collect the proceeds would ipso facto extinguish it entirely, or so far as exercised. Hence the appellants' interest would properly begin when the power ended. This distinction is noticed in Hunt v. Rousmanier; but neither by this test, nor any other, was the power of attorney in question irrevocable, and this judgment must be affirmed.

(D) Power to Revoke and Right to Revoke

SHEAHAN v. NATIONAL S. S. CO.

(Circuit Court of Appeals of United States, Second Circuit, 1898. 87 Fed. 167, 30 C. C. A. 593.)

Judgment for defendant and plaintiff sued out this writ of error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. This is an action to recover damages for breach of contract. The plaintiff was the sole witness, and the only contract with defendant which his testimony tended to establish was one made in 1867, whereby defendant employed him as its agent to sell tickets on commission, with no limitation as to time or provision requiring notice of termination. After he had continued in such employment about nine years, defendant abruptly terminated the contract. In the absence of any provision requiring notice as a condition precedent to termination, or of any clause fixing a term of employment, defendant was entitled to dismiss its agent at pleasure, without thereby giving plaintiff a cause of action for damages sustained by reason of such discharge. The judgment of the circuit court is affirmed.

HOOVER v. PERKINS WINDMILL & AXE CO.

(Supreme Court of Minnesota, 1889. 41 Minn. 143, 42 N. W. 866.)

Judgment for defendant. Plaintiff appeals.

DICKINSON, J. In January, 1886, the plaintiff and the defendant entered into a written contract, by the terms of which the plaintiff became the agent of the defendant, for the sale of windmills in the state of Minnesota. It is unnecessary to state with particularity all the provisions of the contract. It may be said generally, however, that the mills were to be shipped to the plaintiff at an agreed schedule price. He was to bear all the expense incident to keeping and selling them, and to remit the proceeds of all sales to the defendant, himself guarantying the payment of all notes taken upon sales. The defendant was to return to the plaintiff all notes, cash, and drafts so remitted,

after it had realized therefrom the schedule price of the mills shipped to the plaintiff; and when the defendant should have "collected for all of the goods as above, and the aforesaid notes shall be paid *for each year's business,* then they shall pay to the party of the second part [plaintiff] three dollars for each windmill sold *that year,* to pay him for the risk in securing the payment of said notes and accounts." There was nothing in the contract relative to the time during which it should continue in force, unless some inference is to be drawn from the language which we have recited and italicised. In June, 1887, in the course of the settlement of some matters growing out of the above contract, the parties entered into a further agreement in writing, in which, among other things, it was agreed that the business between them should "be continued" under the previously executed contract; it being further agreed that the parties should examine, compare, and check up accounts between them "during the month of January of each year, and as much oftener as either of the parties may desire during the continuance of the business under said existing agency contract." On the 6th of August, 1887, the defendant declined to further perform the contract. This action was then commenced to recover damages, upon the ground that the defendant had broken the contract.

The question is thus presented, whether the defendant had a right then to terminate the contract. The answer to this depends upon the construction of the agreements of the parties. If they made no provision as to the period during which the agency should continue, and if no agreement in that respect can be implied from the nature of the business, then either party had the right to terminate the contract at will. We cannot construe the provisions which we have recited from the written instruments as being intended to express the agreement that the contract should continue in force for a year or for any definite time. That was not the apparent purpose of the parties. It would rather seem from the whole instruments, in which there is no express provision as to how long the agency should continue, that the parties contemplated no definite period. It would remain in force until one or both of the parties should elect to terminate it. It might, of course, continue in force for years. However long the parties might maintain these relations, it was natural, and in accordance with the habits of business men, to have at least yearly accountings and settlements. These provisions, upon which the plaintiff relies as showing an agreement to continue the business from year to year, we think, amount to no more than agreements for yearly accountings so long as the relation established by the contract shall continue. They do not import an agreement that such relations shall continue for any definite period. There is nothing in the nature of the business to which this contract relates which can affect its construction, in the particular under consideration. There is no more apparent reason for construing the agreement as one for a yearly agency, to continue from year to year, than there would have been if the busi-

ness had been the buying or selling of horses. The defendant having the legal right to terminate the contract at will, it is unnecessary to consider whether the circumstances inducing its action would otherwise have justified it or not.

The other questions presented in the case are immaterial, in view of the decision above expressed. Order affirmed.[15]

GLOVER v. HENDERSON.

(Supreme Court of Missouri, 1894. 120 Mo. 367, 25 S. W. 175, 41 Am. St. Rep. 695.)

Action for services rendered and expenses incurred in selling for defendant lots adjoining Kansas City. A plat of 30 acres was divided into lots, which plaintiff was given the exclusive right to sell on a given commission. If he sold out in one year he was to have a $1,500 bonus. He was to bear all expenses of advertising and selling, but was to be reimbursed from the sales for the expenses of laying out the plat. He entered upon the business with zeal, and in five months had sold 4,000 of the 7,000 front feet for $44,732. A difference then arose between plaintiff and defendant, which led to the discharge of plaintiff. The jury allowed plaintiff $4,000 as the reasonable value of his services and the reasonable and necessary outlay.

BLACK, P. J.[16] * * * 1. The first question is whether this action is quantum meruit, for services rendered and reasonable expenses incurred, as claimed by the plaintiff, or whether it is an action for damages for breach of contract. That the petition declares upon quantum meruit we think there can be no doubt. It is true the petition sets out the contract of employment, and shows that services were rendered and moneys expended in the execution of it; but it proceeds to aver that defendant wrongfully discharged the plaintiff, and then states the value of the services rendered and moneys expended, and prays judgment therefor, less the amount received. Had the plaintiff declared for the value of his services, saying nothing about the contract, and to this the defendant had answered by setting up the special contract according to his version of it, and the plaintiff had replied by setting out the contract according to his theory of it, and alleged that the defendant wrongfully revoked the agency, because of which he demanded the value of his services up to the date of his discharge, the issues would have been, in substance, the same that they are under the present pleadings. It is the theory of our Code that the plaintiff must state the facts constituting his cause of action. If he proposes to treat the contract as rescinded,

[15] **Accord:** Bradlee v. Southern Coast Lumber Co., 193 Mass. 378, 79 N. E. 777 (1907); Rhodes v. Forwood, 1 App. Cas. 256, 47 L. J. Exch. 396, 34 L. T. Rep. N. S. 890, 24 Wkly. Rep. 1078 (1876).

[16] **Part of the opinion is omitted.**

and recover for the value of services rendered, as he may do under certain circumstances, there is no reason why he may not set out the contract, the rendition of services thereunder, the wrongful termination of the contract by the defendant, and then declare for the value of the services rendered. Such is the plaintiff's petition in this case, and it is clearly a declaration upon quantum meruit. Ehrlich v. Insurance Co., 88 Mo. 249.

2. The contract in question was one of agency, so that we are brought to the question whether defendant, having revoked the agency, is liable to the plaintiff for the value of services rendered and expenses incurred up to the date of revocation. There is and can be no claim made in this case that plaintiff had conferred upon him a power coupled with an interest. And, as he had no interest in the subject-matter of the agency, the principal had the power, and, in a qualified sense, the right, to revoke the agency at his will. State v. Walker, 88 Mo. 279; Mechem, Ag. § 204.

But the question of the liability of the principal to the agent for services rendered is another and a different thing from the power, or even right, to terminate the agency. Contracts of agency are numerous, and widely variant in their objects, purposes, and terms; so that the question of compensation of the agent, when the agency has been revoked by the principal, will depend upon a variety of circumstances. It is laid down by a recent text writer that "the mere fact that an agent is employed to perform a certain act will not, of itself, amount to an undertaking on the part of the principal that the agent shall be permitted to complete the act at all events, and the principal may fairly, and in good faith, revoke the agency, without liability, at any time before performance." But "where an agent is employed to perform an act which involves expenditure of labor and money before it is possible to accomplish the desired object, after the agent has in good faith incurred expense and expended time and labor, but before he has had a reasonable opportunity to avail himself of the results of this preliminary effort, it could not be permitted that the principal should then terminate the agency, and take advantage of the agent's services, without rendering any compensation therefor." Mechem, Ag. § 620. This is good sense, and, we believe, good law.

But there is still another well-settled and more specific rule, which will determine this branch of this case, and that is this: Where there is an employment for a definite period of time, expressed or implied, and the agent is discharged without cause before the expiration of that period, the principal will be liable to the agent, the same as in case of breach of any other contract; and in such cases the agent may elect to treat the contract as rescinded, and bring an action to recover the value of his services and money expended. Mechem, Ag. §§ 614, 621; Ehrlich v. Insurance Co., 88 Mo. 249; Kirk v. Hartman, 63 Pa. 97.

The contract between the plaintiff and the defendant, as found by the jury, contains no express stipulation to the effect that the agency

should continue for one year, but it contains the stipulation that the plaintiff should have an additional compensation of $1,500, if he sold the lots within one year; and the question, then, is whether there arises an implied agreement that he should have one year in which to sell the lots. Although a contract, on its face and by its terms, appears to be obligatory on one party only, yet, if it was the manifest intention of the parties that there should be a correlative obligation on the other party, the law will imply such obligation. Lewis v. Insurance Co., 61 Mo. 534. But as said in Churchward v. Queen, L. R. 1 Q. B., at page 194, where a contract is silent the court or jury called upon to infer an obligation on the other side which does not appear in the terms of the contract must take great care that they do not make the contract speak contrary to what was the intention of the parties. The question, after all, is one of intention, to be gathered from the tenor and all the terms of the contract, considered in the light of the subject-matter of which the contract treats.

The subject of the agency in question was one whole addition, consisting of 280 lots, and the plaintiff was to have the exclusive right to sell all of them. It is plain to be seen that the $1,500 was an inducement to plaintiff to accept the agency. It was a part, and a considerable part, of the compensation which he was to receive. It is true this part of the consideration was conditional, that is to say, upon the fact that he sold the lots within one year, but the very condition shows that he was to have a year in which to perform it. His right to have a year in which to sell the lots is clearly implied, and this implied part of the agreement is as certain and definite as if it had been stated in so many words. This conclusion seems to us irresistible. Nor was it necessary to submit this question to the jury, for the jury found that the plaintiff was to have an additional compensation of $1,500 if he sold out the lots within one year. The clear intendment and construction of this language is that he was to have a year in which to sell out the addition.

But it is said the plaintiff testified that he reserved the right to quit the work at any time, and hence the defendant had the corresponding right to terminate the agency at will, notwithstanding the agreement concerning the $1,500. The plaintiff testified that he did not bind himself to sell the addition for $80,000 within one year, or to pay a forfeiture if he failed to sell it. He states at one place in the lengthy examination that he did not bind himself to devote the entire year to the sale of Round Top, and could have quit at any time, but he was not that kind of a man. At another place he says he was bound to give his time and attention to the sale of the land, and to try to sell it. He evidently undertook to make a reasonable effort to sell the lots. This much is implied in the terms of the agreement found by the jury to have been made by these parties. It is equally true that he was not bound, at all events, to continue his efforts during the entire year. But it does not follow that the defendant had the right

to revoke the agency, without cause, at any time during the year. Says Mechem: "It is, in many cases, difficult to determine whether the parties have made a definite agreement for a fixed term or not. It is not indispensable that they should, in the first instance, be both bound for the same period. It may lawfully be made to rest in either party to determine, at his option, that the agreement shall be one for a certain time." Mechem, Ag. § 211.

Such questions as this must be considered in the light of the nature and object of the agency, and the agreement which the parties have made. The defendant was anxious to dispose of the addition, and the scheme devised to sell it was problematical and doubtful. The defendant agreed, as we have seen, to give the plaintiff one year in which to earn, if he could, the extra $1,500; and this agreement as to time is not void or unlawful because the plaintiff had the right, at his option, to abandon the contract before the expiration of the year. The fact that plaintiff had such right or option gave the defendant no right to terminate the agency before the expiration of the year, so long as the plaintiff was making diligent efforts to sell the lots.

3. As the plaintiff can maintain this action to recover the value of his services and the reasonable expenses incurred by him, it follows that he had the right to produce evidence showing the value of such services. Evidence of what is usually charged for similar services at the same place was admissible. And it was also competent to show, by persons who were acquainted with the value of like services, what, in their opinion, the services of the plaintiff were worth. The witnesses called by the plaintiff for this purpose were real-estate agents, and their evidence shows that they were fairly acquainted with the value of like services. The fact that commissions in like cases are generally regulated by contract, and the further fact that these lots were sold under what is called a "unique and unusual plan," did not affect the competency of the evidence of these witnesses as to the value of the services rendered by the plaintiff. And it was also competent to show what commissions had been paid in the same locality for selling other additions. The differences between the plans adopted in making such other sales and the sales in question would be a matter for the jury to consider, but such differences do not affect the competency of the evidence. There was no error in the admission of evidence on this subject.

4. It follows, also, from what has been said, that the measure of the plaintiff's damages was the reasonable value of the services rendered, and the moneys fairly expended in performing such services. The instructions as to damages proceed on this theory, and there is no error in them. * * *

Judgment affirmed.

STIER v. IMPERIAL LIFE INS. CO.

(Circuit Court of the United States, W. D. Missouri, 1893. 58 Fed. 843.)

Action by Geo. H. Stier against the Imperial Life Insurance Company, of Detroit, Michigan, to recover damages for breach of contract. To the report of a referee both parties except.

PHILIPS, District Judge.[17] [After stating the facts:] It is more important than usual, in the consideration of this case, to keep in mind the character of the action and the state of the pleadings. The action throughout is predicated upon a contract, and proceeds for breaches thereof. The contract is set out in substance, and it is then averred that the plaintiff kept and performed the same on his part, and that the defendant broke and failed to keep the same. The petition alleges that the contract was to continue in force until the same was terminated by the neglect or refusal on the part of plaintiff to account for moneys belonging to defendant by the terms and conditions of the contract, or until there was dishonesty or noncompliance with the rules and instructions of said contract on the part of the plaintiff. * * *

The breaches of the contract assigned are that in 1891 the defendant refused and ceased to issue any natural renewable term policies, etc., and refused to permit plaintiff to solicit or take any applications for the policies mentioned in the contract, and made an entire change in the kind of policies issued, and substituted new and different policies therefor, which substituted policies were not so advantageous to plaintiff as those provided for; and afterwards made no effort to collect the renewal premiums on policies issued under applications taken by defendant, but used every means to discourage, and did discourage, parties holding such policies from paying renewal premiums, thereby depriving plaintiff of his commissions, etc. It is to be observed that it is nowhere averred that defendant discharged the plaintiff from his agency, nor is it averred that the plaintiff secured an average of $20,000 insurance per month for three consecutive months, as provided by the contract.

The answer, after tendering the general issue, avers that the plaintiff discontinued acting under said contract long prior to the institution of the suit, without notice to defendant, and engaged in soliciting insurance for another insurance company, a rival in business to the defendant. * * *

If the plaintiff discontinued acting under said contract, and engaged in soliciting insurance for another rival insurance company of the defendant, and "he voluntarily abandoned the further performance of said contract on his part, and by mutual consent said contract was annulled and surrendered," it is not perceived that there is any foundation for the finding of the referee that defendant could not terminate the contract at its pleasure. Nor am I satisfied, as a matter of law,

[17] Part of the opinion is omitted.

that defendant did not have the power to terminate the agency. In the absence of an agreement of employment for a definite period of time, the agency is one at will, determinable at the pleasure of the principal, unless the agency is coupled with an interest in the subject-matter. This is fundamental.

Mechem on Agency (section 204) says: "The authority of the agent to represent the principal depends upon the will and license of the latter. It is the act of the principal which creates the authority; * * * and unless the agent has acquired, with the authority, an interest in the subject-matter, it is in the principal's interest alone that the authority is to be exercised. * * * It is the general rule of law, therefore, that as between the agent and his principal the authority of the agent may be revoked by the principal at his will at any time, with or without giving reason therefor, except in those cases where the authority is coupled with a sufficient interest in the agent; and this is true, even though the authority be in express terms declared to be exclusive or irrevocable. But, though the principal has the power thus to revoke the authority, he may subject himself to a claim for damages if he exercises it contrary to his express or implied agreement in the matter."

Chief Justice Marshall, in Hunt v. Rousmanier, 8 Wheat, 203, 5 L. Ed. 589, with characteristic aptness defines a power coupled with an interest. He says: "What is meant by the expression 'a power coupled with an interest'? Is it an interest in the subject on which the power is to be exercised, or is it an interest in that which is produced by the exercise of the power? We hold it to be clear that the interest which can protect a power * * * must be an interest in the thing itself. In other words, the power must be ingrafted on an estate in the thing. The words themselves seem to import this meaning. A power coupled with an interest is a power which accompanies or is connected with an interest. The power and the interest are united in the same person. But, if we are to understand, by the word 'interest,' an interest in that which is to be produced by the exercise of the power, then they are never united."

Clearly, therefore, the plaintiff had no such interest in the subject-matter of the contract as would take away the customary option of the principal to terminate the agency. But it is claimed by the plaintiff, on account of article 18 of the contract in question, that the implication was that the power of dismissal is denied, except for the causes therein specified. This article is as follows: "This contract may be terminated upon the neglect or refusal of the said George H. Stier to account for all moneys belonging to the company according to rule 7, or for dishonesty, or for noncompliance with any of the foregoing rules and instructions."

The case of Newcomb against this same company (51 Fed. 725) is relied upon in support of this construction. I should feel great embarrassment to oppose my unsupported opinion against any considerate conclusion reached by the learned judge who delivered that opinion.

It is to be kept in mind, to a proper understanding of the Newcomb Case, that the action there was for a quantum meruit, and that the facts alleged were in many respects quite different from these under consideration, and the questions passed upon arose upon demurrer to the petition.

I am unable to perceive that the provision that the contract might be terminated upon certain specified grounds enforces the conclusion that it was intended thereby to prolong the existence of the agency indefinitely, or so long as the agent did none of the specified delicts. A not dissimilar question arose in Sewing Machine Co. v. Ewing, 141 U. S. 627, 12 Sup. Ct. 94, 35 L. Ed. 882, where it was held that an agency contract containing the provision that a "violation of the spirit of this agreement shall be sufficient cause for its abrogation" does not imply that it could only be abrogated for sufficient cause. Mr. Justice Harlan said of this (page 636, 141 U. S., and page 97, 12 Sup. Ct.): "This clause, it may be suggested, was entirely unnecessary if the parties retained the right to abrogate the contract after 1875 at pleasure, and implies that it could be abrogated only for sufficient cause, of which, in case of suit, the jury, under the guidance of the court as to the law, must judge, in the light of all the circumstances. We cannot concur in this view. The clause referred to is not equivalent to a specific provision declaring affirmatively that the contract should continue in force for a given number of years, or without a limit as to time, unless abrogated by one or the other party for sufficient cause. It was inserted by way of caution, to indicate that the parties were bound to observe equally the spirit and letter of the agreement while it was in force."

It seems to me that the proper meaning of article 18 is that, for any of the designated derelicts, the right arose absolutely to the principal to terminate the contract without any liability, leaving the right untouched to exercise the power of discontinuance subject to a liability under a quantum meruit action. The general rule of law is that such contracts are revocable at pleasure "unless the power to revoke is restrained by express stipulation." Mechem, Ag. §§ 209, 210. This rule is aptly put in Coffin v. Landis, 46 Pa. 431, 432. The court say: "The true question is, what was the contract? To what did the parties bind each other? We are not at liberty to make contracts for them, or to add any stipulation which they have not seen fit to incorporate. We cannot give a mere expectation the sanction or binding force of a covenant. * * * There is nothing said in regard to the time during which the agreement should continue, and nothing in its language to define the duration of the service of plaintiff or his employment by the defendant. This the contracting parties appear to have left out of consideration, or at least failed to make it a subject of covenant obligation. It may be that neither was willing to bind himself for any definite period. * * * It is evident, then, that were we so to construe the agreement as to hold it obligatory upon the one party to em-

ploy, and upon the other to serve, during any period, we should be in danger of imposing liabilities which both parties absolutely avoided assuming. And, if it be admitted that neither of the parties contemplated a severance of the relation affirmed by the contract at the will of the other party, it does not follow that we are at liberty to treat the agreement as continuing a covenant against him. That would be to make an expectation of results equivalent to a binding acknowledgment that they should follow."

The case of Insurance Co. v. Williams, 91 N. C. 69, 49 Am. St. Rep. 637, pertinently illustrates the application of this rule. Williams was appointed agent to solicit insurance. On first-year payments he was to receive a given per cent., and on renewals a given per cent. The agent prosecuted his agency to a considerable extent, when the company, unable to successfully conduct its business, sold out and assigned many policies to another insurance company, and renewals were effected, through another agency, on some of the policies taken by Williams. For these renewals he sought to recover compensation. Although it might have been there, as in the case here, that the agent was induced to accept the agency in reliance on the expectancy of profits from the renewals, the court held that the company, in the absence of any express provision to the contrary in the contract, had the right to terminate the contract in the manner it did; that the agent had no such interest associated with the business as entitled him to a continuance of the agreement against the will of the principal. "The right to compensation is associated with a continuance of services, and the compensation is the agreed measure of their value. * * * Although renewals are the consequence of the original contract of insurance, and in this particular beneficial to the company, yet the full compensation given and accepted for this service is the twenty-five per centum on the sum received, provided in the contract which creates the agency and regulates its terms."

While the contract here provides that the agent may be entitled to commission on renewal premiums, notwithstanding the termination of the agency for any cause save dishonesty, yet it is on the express condition that the agent has secured $1,000,000 of policies in force; but there is no claim made that he had secured this amount. The principal difference between the case supra and this is that Williams sought to recover his commission on cases actually renewed, but by another agent, while this plaintiff seeks to recover damages on the theory that his interest would have been equal to $1,200 a year for three years, had the company diligently striven to effect such renewals. It is a difference, it seems to me, without a legal distinction.

There must be, in the absence of a clear provision to the contrary, the element of mutuality in such a contract. If, as against the principal, the agent had the right to insist on a continuation of the agency so long as he did none of the prescribed acts in article 18, the correlative right of the principal must obtain to hold the agent to perpetual

service, or so long as he was faithful; and thus it would result that, nolens volens, the employment could be made perpetual. It is quite evident from the second paragraph of the opinion in the Newcomb Case, supra, that the learned judge had in mind the recognized distinction between the reserved power to discharge and the right and wrong of a discharge, where the remedy is not in an action ex contractu for the discharge, but a quantum meruit action predicated upon its injurious exercise. In the latter instance the suit is not founded on the breach of the contract, as such, but is an action of assumpsit for a quantum meruit, in which the contract may be put in evidence, and will control the maximum of recovery. Mansur v. Botts, 80 Mo. 654, 655, and citations. Keeping this distinction in view, the vice is apparent in the finding of the referee that the defendant broke its contract with the plaintiff in not permitting him to continue the prosecution of his work in taking insurance on the natural premium plan, or in discouraging the prosecution of that system by its determination to specially prosecute the level premium policies. * * *

The motion for a new trial is denied.

ATKIN v. ACTON.

(Court of King's Bench, 1830. 4 Car. & P. 208, 19 E. C. L. 478.)

A clerk and traveller, hired by the year, attempted to take improper liberties with his employer's housemaid. The employer discharged him, and said he would pay him the wages already earned. Plaintiff refused this, and sues in assumpsit for £130 wages under the contract of hiring. Plea: General issue, a set-off, and a tender of £14.

Lord TENTERDEN, C. J. Assuming that the effect of the agreement is that it creates a hiring for a year, yet, if the plaintiff misconducted himself [18] in the way described, the defendant had a right to discharge him, and was not compellable, according to my judgment, to pay him any money at all; at all events, he was not liable to pay him any more than for the time during which he actually served, which will

[18] Drunkenness on the part of the agent may be a sufficient cause for discharge of the agent if it does or might have an injurious effect on the business of the principal, though not otherwise. Denman, C. J., in Wise v. Wilson, Carr & Kirwyn, 662, 47 E. C. L. 662 (1845); Gonsolis v. Gearhart, 31 Mo. 585 (1861). Disgraceful conduct of an agent in associating with a woman of ill repute, which would naturally reflect discredit on the principal, and be injurious to his business interest, constitutes ample legal ground for the discharge of the agent. Gould v. Magnolia Metal Co., 207 Ill. 172, 69 N. E. 896 (1904), affirming 108 Ill. App. 203 (1903).

Disobedience of instructions is ground for discharge. Dodge v. Reynolds, 135 Mich. 692, 98 N. W. 737 (1904). And so is engaging in a rival business by the agent, even though it does not cause his principal any injury. Dieringer v. Meyer, 42 Wis. 311, 24 Am. Rep. 415 (1877). See, also, Singer v. McCormick, 4 Watts & S. 265 (1842), in which an agent of a partnership at the direction of one partner changed the books to the detriment of the other. The court found this justified his discharge.

bring it round to the demand on the counts for work and labour. With respect to the tender, it appears to me that it has been proved. The plaintiff refused to take the money offered, and as the sum was mentioned, and he would not accept it, I think it is quite sufficient, because his objection was not, that the sum put before him was not the precise amount offered, but his answer shows that he was not willing to take the money at all. It therefore was not necessary for the defendant to get the sovereign changed so as to offer the precise sum.

Verdict for the defendant.

(E) Specific Performance of the Agency

MAIR v. HIMALAYA TEA CO.

(Court of Chancery, 1865. L. R. 1 Eq. 411, 11 Jur. N. S. 1013, 14 W. R. 165.)

Mair & Co. had for many years been in business in London and Calcutta, and organized the Himalaya Tea Company for the cultivation of tea. A prospectus was issued stating the object of the company and the appointment of Mair & Co. as agents. The latter took a large number of shares. The directors, three years later, induced Mair & Co. to resign as agents upon assurance of relief of all payments on account of the shares subscribed. They then appointed new agents, but sued Mair for the amount due on his shares and interest. He files his bill for relief by way of an accounting, and by injunction to restrain them from acting upon his resignation, or alternatively from suing for payment upon the shares accepted by him.

Sir W. PAGE WOOD, V. C. I cannot see my way to granting the plaintiff the relief asked, the whole matter being one for a court of law to deal with, so long as care is taken that the plaintiff shall not be prejudiced in the proceedings at law by his voluntary resignation. The contract between the plaintiff and the company must be regulated by the articles of association only, on the faith of which other persons have incurred their liability, and the Court cannot enter into any arrangements antecedent to the articles. Even assuming, in favour of the plaintiff, the construction given by him to the articles that he was to be irremovable, except by the authority of a general meeting, or that his acceptance of shares was conditional on his being retained as agent, the Court cannot act in his favour, as the duties of an agent are in the nature of personal service, and as such incapable of being enforced in equity.[19] Johnson v. The Shrewsbury & Birmingham Rail-

[19] An agent should be not merely trusted, but personally acceptable to a principal, and the courts will not force upon the principal an objectionable agent no matter how able he may be. Pickering v. Bishop of Ely, 2 Y. & Coll. C. C. 249, 12 L. J. Ch. 271, 7 Jur. 479 (1843). When the principal is a partnership the agent should be acceptable to both partners. Singer v. McCormick, 4 Watts & S. 265 (1842). Nor will agency be specifically enforced, for that would be to assert that the principal may not revoke the authority of the

way Company, 3 D. M. & G. 914, etc. The plaintiff will have his cross action in respect of the contract; and as he cannot be relieved by this Court, there will be no order upon the present motion. As, however, the plaintiff has some reason for saying that his resignation was given under the impression that he would be thereupon relieved from all liability, the defendants must undertake not to set up in any proceedings at law the alleged resignation of the plaintiff.

(F) Recovery of Damages by the Agent

JACOBS v. WARFIELD.

(Supreme Court of Louisiana, 1871. 23 La. Ann. 895.)

WYLY, J. The defendant has appealed from the judgment condemning her to pay the plaintiff $2610 for violating the contract which she made with him on the sixth day of October, 1865, and for money advanced by him for her benefit under said contract.

In this contract the plaintiff was employed as an agent to superintend all the business of the defendant in the parish of St. John the Baptist, in relation to certain wild lands which the defendant owned in said parish; and he was specially authorized to take charge of and exercise general control over said property; to prevent the commission of trespass or wastes upon said lands, and to appear in court to prosecute and defend all suits in reference thereto, as occasion might require "with the distinct understanding that no other charge shall be made by the said Jacobs for his services in taking charge of the said lands and removing therefrom all trespassers, than one-fourth interest in the revenue derived from the sale of wood and timber cut therefrom by said Jacobs and his employés, as herein expressed, which shall be a full and adequate remuneration and compensation for all services that he, said Jacobs, may render the said Mrs. Warfield under and by virtue of this procuration."

It was further stipulated that the said agent was not to institute proceedings against any trespasser without first obtaining the written consent of the defendant; and, also, that the said Jacobs was in no wise to disturb or interfere with such persons as might have the written sanction of Mrs. Warfield to be on said lands and cut and sell timber therefrom.

There was no period fixed in the act as the term for which the said Jacobs was employed. Under this contract we think the defendant had

agent. Elwell v. Coon (N. J. Ch.) 46 Atl. 580 (1900). Moreover to specifically enforce the contract against the principal would be inequitable, because lacking mutuality. The Courts cannot compel performance by the agent, and therefore will not decree specific performance by the principal. This remedy is available only when the court can enforce the contract on both sides, so that the whole agreement can be carried into effect according to its terms. Alworth v. Seymour, 42 Minn. 526, 44 N. W. 1030 (1890).

the right to discharge her agent and employé whenever she saw fit to do so.

From the evidence we are satisfied that the plaintiff did not comply with his contract, and the defendant had good cause to discharge him. His demand for damages for breach of contract must, therefore, fail. It appears, however, that the plaintiff paid ten dollars to an attorney and twenty-five dollars costs in a suit for the benefit of the defendant, and we think he was justifiable in doing so under the act of procuration. For these sums he should have judgment.[20] The demand for the other sums which the plaintiff claims to have paid for the defendant pursuant to the contract is not supported by the evidence.

It is therefore ordered that the judgment herein be reduced to thirty-five dollars, and as thus amended that it be affirmed. It is further ordered that the plaintiff pay costs of this appeal. Rehearing refused.

BLUMENTHAL v. GOODALL.

(Supreme Court of California, 1891. 89 Cal. 251, 26 Pac. 906.)

Action to recover commissions claimed to have been earned by one Oesterreicher, a real estate agent, under authority from defendant to sell certain blocks for $1,500 each, on which he was to have a commission of $100 for each block, "This contract to be in force for ten days from date hereof." On the same day the agent agreed orally with one Fulder for the sale of the blocks at the price named, but, he failing to put the agreement in writing, the agent afterward made a written agreement with Von Rhein & Co. Next day defendant revoked the authority, claiming it had been procured by misstatements by the agent. The court found there had been no fraud or misrepresentations by the agent. The latter assigned his claim to plaintiff. Judgment for defendant. Motion for new trial denied. Plaintiff appeals from the judgment and order.

GAROUTTE, J.[21] [After stating the facts:] * * * It is a general principle of law that, as between the principal and the agent, the authority of the agent is revocable at any time, if not coupled with an interest, and this principle is recognized by section 2356 of the Civil Code. Mechem, upon the Law of Agency (section 209), says: "But this power to revoke is not to be confounded with the right to

[20] If the agent has in good faith incurred expenses, and expended time and labor in the matter, or agency, the principal will not be permitted to terminate it and appropriate the results of the agent's services without compensating him therefor. Royal Remedy and Extract Co. v. Gregory Grocery Co., 90 Mo. App. 53 (1901); Green v. Cole, 103 Mo. 70, 15 S. W. 317 (1890); S. C., 24 S. W. 1058 (1894). But if his compensation depends upon success, and the agency has been rightfully and in good faith revoked before he fulfills the agreement, he has no right to compensation. Milligan v. Owen, 123 Iowa, 285, 98 N. W. 792 (1904).

[21] Part of the opinion is omitted.

revoke. Much uncertainty has crept into the books and decisions from a failure to discriminate clearly between them. * * * As has been seen, the relation of the agent to his principal is founded in a greater or less degree upon trust and confidence. It is essentially a personal relation. If, then, for any reason, the principal determines that he no longer desires or is able to trust and confide in the agent, it is contrary to the policy of the law to undertake to compel him to do so. * * * But it by no means follows that, though possessing the power, the principal has the right to exercise it without liability, regardless of his contracts in the matter.[22] It is entirely consistent with the existence of the power that the principal may agree that for a definite period he will not exercise it, and for the violation of such an agreement the principal is as much liable as for the breach of any other contract." In section 615 the author says: "In using the expressions rightfully and wrongfully revoked, it will be understood that the question of the principal's power to revoke is not involved, but whether by express or implied agreement, having undertaken not to exercise that power, he has, nevertheless, exercised it in violation of the agreement." Section 620 reads: "* * * Thus if, after a broker employed to sell property had in good faith expended money and labor in advertising for and finding a purchaser, and was in the midst of negotiations which were evidently and plainly approaching to success, the seller should revoke the authority with the purpose of availing himself of the broker's efforts, and avoiding the payment of his commissions, it could not be claimed that the agent had no remedy. In these cases it might well be said that there was an implied contract on the part of the principal to allow the agent a reasonable time for performance, that full performance was wrongfully prevented by the principal's own acts, and that the agent had earned his commission."

In the case of Lane v. Albright, 49 Ind. 279, where the owner of the real estate sold it pending the negotiations of the agent in making a sale, and prior to the expiration of the time given by the owner to the agent, and where the agent within the time given did find a purchaser, the court says: "The appellant performed all that he was required by the contract to do, and was prevented by the appellee from selling the land. The appellee disabled himself from carrying out the contract of sale made by the appellant." "The fact that the appellee had authorized appellant to sell his land did not deprive himself of the power of selling it, but he could not thereby avoid his liability to appellant." In Hawley v. Smith, 45 Ind. 183, upon full consideration the court decided that the rule is that, where the performance by one party is prevented by the act of the other, the party not in fault should recover in damages such sum as will fully compensate

[22] The distinction between the power and the right to revoke is emphasized in Kilpatrick v. Wiley, 197 Mo. 123, 95 S. W. 213 (1906); Singer v. McCormick, 4 Watts & S. 265 (1842).

him for the injury which he has sustained by reason of the non-performance of the contract. To the same effect is Story, Ag. § 466.

In the case at bar it may be conceded that the agent had not entirely carried out his contract at the time the defendant revoked his authority, but upon the 19th day of July, and within the limit of time fixed by the contract, he did produce the purchaser, with his money in his hand, demanding a deed. The court found that the plaintiff entered into this contract in good faith, and that the writing was untainted with fraud. The record discloses that the agent was most active in his efforts to find a purchaser; indeed, the real reasons of defendant's revocation of the agency appear to be that the agent was too active, as he had found two purchasers for the property instead of one. The case of Brown v. Pforr, 38 Cal. 553, would seem to indicate upon a cursory examination, views hostile to the principles expressed in the authorities cited in this opinion, but, upon examination of that case, it can readily be seen that no hostility exists. The contract in that case does not expressly stipulate that it shall remain in force 30 days, and the opinion of Justice Sanderson clearly intimates that, if there had been a provision in the contract that it should remain in force for such length of time, the defendant would not have been permitted to prevent performance, and escape without making compensation to the agent.

The remaining cases cited by respondent upon this question add no merit to his contention. The defendant expressly agreed that his contract with the agent should remain in force for the period of 10 days. The act of the agent in finding a purchaser required time and labor for its completion, and within three days of the execution of the contract, and prior to its revocation, he had placed the matter in the position that success was practically certain and immediate, and it would be the height of injustice to permit the principal then to withdraw the authority and terminate the agency as against an express provision of the contract, and perchance reap the benefit of the agent's labors, without being liable to him for his commissions. This would be to make the contract an unconscionable one, and would offer a premium for fraud by enabling one of the parties to take advantage of his own wrong, and secure the labor of the other without remuneration.

Let the judgment and order be reversed, and the cause remanded, with direction to the court below to enter judgment for the plaintiff as prayed for.

(G) Manner of Revocation

CLARK v. MULLENIX.

(Supreme Court of Judicature of Indiana, 1858. 11 Ind. 532.)

WORDEN, J.[28] Bill in chancery, filed under the old practice, by the appellee against the appellant, for the specific performance of a contract for the sale of land. The cause was tried since the code took effect, but there was a motion for a new trial, on the finding of the Court for the plaintiff below, which was overruled, and exception taken, the bill of exceptions setting out the evidence.

The bill avers that in May, 1848, the plaintiff purchased of the defendant, Nancy Clark, a certain piece of land therein described for the sum of $400, to be paid in four equal payments, on the 25th of December, of the years 1848, 1849, 1850, and 1851, with interest from the 1st of May, 1848; that he executed to the defendant four notes for the purchase-money, as above specified, and was put, by her, in possession of the land, and has made valuable and lasting improvements thereon; that he has paid to the defendant the purchase-money, and demanded a deed, which she refuses to execute.

The facts charged in the bill are denied under oath.

The Court, on its finding, decreed specific performance,

It appears from the evidence that the defendant, who resided in Kentucky, by her letters to one John Allee, of Indiana, authorized him to sell the land in controversy; and that in pursuance of such authority, said Allee, as agent of the defendant, sold the land to the plaintiff, and put him in possession thereof, and also took from the plaintiff the notes above specified for the purchase-money, which notes were retained in the possession of Allee until they were paid to him by the plaintiff, and taken up. Soon after the land was sold, Allee received letters from the defendant ratifying and confirming the sale. This was in 1848.

Afterwards, the defendant became dissatisfied with the sale thus made, on the alleged ground that it had been sold for less than its value, and sought to repudiate it. On the 24th of September, 1850, she executed to Henry H. Clark, a power of attorney, whereby she authorized and empowered him to sell and convey the land in controversy, and to receive the purchase-money, and all rents or claims due her in the state of Indiana. About the 1st of October, 1850, said Henry H. Clark, having with him the power of attorney, came to the county of Putnam, and had an interview with the plaintiff in relation to the land. The plaintiff and said Henry H. Clark went to see said Allee. In the language of said Allee the plaintiff's witness,

[28] Part of the opinion is omitted.

"Henry H. Clark came to my house in company with the complainant, and said his sister (the defendant) was dissatisfied with the trade, and gave notice to the complainant that she wanted the land, and exhibited his power of attorney from defendant." It appears that after some consultation between the plaintiff and Allee, it was agreed that the power of attorney should be submitted to some lawyer of Greencastle, and accordingly the whole matter was submitted to Judge Farley for his opinion. On the same evening after consulting Judge Farley, the complainant agreed to set aside the contract, and give $500 for the land.

At the time of this transaction none of the principal had been paid on the notes for the purchase-money, and perhaps but a portion of the interest. The principal and interest due on the notes were afterwards paid by complainant to said Allee, but no part of it appears ever to have been paid to the defendant, nor does it appear that she has ever received anything upon the land.

The question arises whether, upon the foregoing facts (admitting the original contract to be valid and binding, and not set aside and canceled by the subsequent agreement between the plaintiff and said Henry, as the agent of the defendant), the payment of the purchase-money by the plaintiff to said Allee, was a payment to the defendant?

We are clearly of opinion that it was not. The authority of Allee in the matter was clearly revoked and ended, and a payment to him after the plaintiff had notice that he was not authorized to receive it, was a nullity, so far as the defendant was concerned.

In Story on Agency, § 474, it is said that an authority may be revoked by a "direct and formal declaration publicly made known, or by an informal writing, or by parol; or it may be implied from circumstances. What circumstances will or will not amount to a revocation, or to notice of a revocation by implication, cannot be stated with any definite certainty. But there are some acts which admit of little or no doubt. Thus, for example, if the principal appoints another person to do the same act, this will ordinarily be construed to be a revocation of the power of the former agent."

Here, before the purchase-money was paid to Allee, the defendant had executed a power to Henry H. Clark, by which she not only authorized him to sell and convey the land, but to receive the purchase-money and all claims due her in the state of Indiana, and of this fact the plaintiff had full notice. It is useless to say that the defendant's leaving of the notes in the possession of Allee, impliedly gave the plaintiff the right to pay the money to him. The plaintiff knew that the defendant wished to avoid the contract, and did not wish to receive the money upon it at all. There could be no implied authority, under such circumstances, for Allee to receive the money, and his express authority, if he had previously had any, was revoked. The revocation of Allee's authority would not, of course, affect the validity of a sale made by him previous to the revocation, but it took away his

right to act further as the agent of the defendant, either in receiving the purchase-money, or otherwise executing the contract.

The payment of the purchase-money to Allee, under the circumstances, not being a payment to the defendant, and this being all the payment made, there was a failure to make out the case so far as this essential particular is concerned, and on this ground a new trial should have been granted. * * *

Judgment reversed, with costs. Cause remanded for a new trial.

BROOKSHIRE v. BROOKSHIRE.

(Supreme Court of North Carolina, 1847. 30 N. C. [8 Ired.] 74, 47 Am. Dec. 341.)

Plaintiff was appointed by deed of defendant and others as agent to go to Alabama to settle the estate of their brother and bring back to each his share. After one trip the defendant by parol revoked the authority. Plaintiff made a second trip and now sues defendant for his share of the expenses.

NASH, J.[24] It is not denied by the plaintiff, that, in this case, it was within the power of the defendant to put an end to his agency, by revoking his authority. Indeed, this is a doctrine, so consonant with justice and common sense, that it requires no reasoning to prove it. But he contends, that it is a maxim of the common law, that every instrument must be revoked by one of equal dignity. It is true an instrument under seal cannot be released or discharged by an instrument not under seal or by parol, but we do not consider the rule as applicable to the revocation of powers of attorney, especially to such an one as we are now considering. The authority of an agent is conferred at the mere will of his principal and is to be executed for his benefit; the principal, therefore, has the right to put an end to the agency whenever he pleases, and the agent has no right to insist upon acting, when the confidence at first reposed in him is withdrawn.

In this case, it was not necessary to enable the plaintiff to execute his agency, that his power should be under seal; one by parol, or by writing of any kind, would have been sufficient; it certainly cannot require more form to revoke the power than to create it. Mr. Story, in his treatise on Agency (page 606), lays it down that the revocation of a power may be, by a direct and formal declaration publicly made known, or by an informal writing, or by parol; or it may be implied from circumstances, and he nowhere intimates, nor do any of the authorities we have looked into, that when the power is created by deed, it must be revoked by deed. And, as was before re-

[24] Part of the opinion is omitted.

marked, the nature of the connection between the principal and the agent seems to be at war with such a principle. It is stated, by Mr. Story, in the same page, that an agency may be revoked by implication, and all the text-writers lay down the same doctrine. Thus, if another agent is appointed to execute powers, previously entrusted to some other person, it is a revocation, in general, of the power of the latter. For this proposition, Mr. Story cites Copeland v. The Mercantile Insurance Company, 6 Pick. 198. In that case, it was decided that a power, given to one Pedrick to sell the interest of his principal in a vessel, was revoked by a subsequent letter of instruction to him and the master, to sell.

As then, an agent may be appointed by parol, and as the appointment of a subsequent agent supersedes and revokes the powers previously granted to another, it follows, that the power of the latter, though created by deed, may be revoked by the principal, by parol. But the case in Pickering goes further. The case does not state, in so many words, that the power granted to Pedrick, was under seal, but the facts set forth in the case, show, that was the fact; and, if so, is a direct authority in this case. This is the only point raised, in the plaintiff's bill of exceptions, as to the Judge's charge. * * *

Judgment affirmed.

DAVOL v. QUIMBY.

(Supreme Judicial Court of Massachusetts, 1865. 93 Mass. [11 Allen] 208.)

Contract, to recover wages. The defence was payment to the plaintiff's agent; whose agency was denied by the plaintiff.

At the trial in the superior court, before Wilkinson, J., it appeared that the plaintiff ordered one Keach to collect the debt of the defendant, and, after paying to one Howe a sum due to him from the plaintiff, to remit the balance to the plaintiff. A creditor of Keach, ascertaining that the latter had demanded the money of the defendant, and supposing it to be his own debt, commenced a trustee process against Keach, summoning the defendant as trustee. The plaintiff then authorized Howe to settle the trustee process "the best way he could," receive the money due from the defendant, apply so much thereof as was necessary in payment of the sum due from the plaintiff to Howe, and pay the balance to the plaintiff. Afterwards the defendant received notice from an attorney at law, demanding the money for and on account of the plaintiff. After this, the defendant paid the money to Howe. The plaintiff did not notify Howe of any withdrawal of his authority.

The plaintiff's counsel requested the court to instruct the jury that if the defendant had notice to pay the attorney of the plaintiff, he could not be justified in paying the money to Howe after such notice

from the plaintiff, and if he did so he did it at his own risk, and did not discharge himself from liability to the plaintiff. The judge refused so to rule, and the jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

BIGELOW, C. J. The instruction asked for by the defendant was rightly refused. It appeared distinctly from the evidence that the plaintiff authorized Howe to receive the money from the defendant; but it was not shown that this authority was subsequently revoked. The mere fact that the plaintiff also authorized another person to receive the same money did not prove a revocation. There may be two persons appointed to exercise the same power as agents for a principal.[25] If there is nothing in the nature of the agency to render an authority in one person inconsistent with a like authority in another, both may well be authorized, and the acts of either or both, within the scope of the agency, will be valid and binding on the principal. So it was in the case at bar. The defendant paid to one agent of whose authority he had had notice. This authority was not revoked by the notice given to the defendant that the plaintiff had also appointed another agent with similar authority. There was no other evidence of revocation.

Exceptions overruled.

KELLY v. BRENNAN.

(Court of Chancery of New Jersey, 1897. 55 N. J. Eq. 423, 37 Atl. 137.)

Bill for specific performance of a contract claimed to have been made by defendant by her agent David Giltinan.

GREY, V. C.[26] There are two questions of fact in this case on which the several parties are at variance, the settlement of which will determine their rights. The complainant asserts that she became the equitable purchaser of the lot in question by a memorandum of sale obtained from Mr. Giltinan, the authorized agent of the defendant,

[25] The appointment of a second agent to perform the same duties as to the same contract may, however, supersede the previous appointment and revoke the authority of the first agent. Williamson v. Richardson, Fed. Cas. No. 17,754 (1867).

If two agents are employed separately to sell the same property, though either may dispose of it until a sale, yet if a sale is effected by one, that will, of course, terminate the power of the other. Hatch v. Coddington, 95 U. S. 48, 24 L. Ed. 339 (1877); Ahern v. Baker, 34 Minn. 98, 24 N. W. 341 (1885); post, p. 274. The appointment of two joint agents revokes a previous appointment of one of them as a several agent. Copeland v. Mercantile Ins. Co., 6 Pick. 198 (1828). A power of attorney will not be revoked by the giving of some other instrument (a deed of trust) which is not inconsistent with the continuance of the power. French v. Townes, 10 Grat. 513 (1853). Nor by other acts of the principal (bringing suit to collect a debt) which are entirely consistent with an intent to continue the agency. Walker v. Barrington, 28 Vt. 781 (1856).

[26] Part of the opinion is omitted.

Mrs. Brennan. She also alleges that the defendant Crosby knew she had obtained this contract, and, in order to cheat her of her bargain, afterwards entered into a subsequent contract with Mrs. Brennan herself. The complainant prays that the specific performance of her contract obtained through the agent may be decreed.

As to the first point, the dispute turns upon the assertion on the part of the complainant of Mr. Giltinan's authority to bind Mrs. Brennan by a contract of sale, and a denial by the defendant Mrs. Brennan that he had any such power. The original employment of Mr. Giltinan was in writing, and made him Mrs. Brennan's agent to sell the property, fixing his commission. She subsequently, as Mr. Giltinan testifies, became disquieted (whether reasonably or not is of no consequence), and caused the words, "subject to my approval," to be inserted in the written memorandum employing him. Mr. Ferris, Mrs. Brennan's attorney, who attended to this change, says it was done about the middle of July. Shortly after this, about the middle of August, she, by her attorney, withdrew this paper altogether from Mr. Giltinan. Mr. Giltinan continued to receive offers and to discuss the sale of the property with Mrs. Brennan for some time after the withdrawal, reporting offers, which were not accepted.

But, if it be assumed that Mrs. Brennan allowed Mr. Giltinan to retain any authority to sell, the real question on this branch of the case is, what was the character of that authority at the time he contracted with Kelly? That it was originally in writing and unlimited all agree. That it was modified is also undisputed. The reason for the insertion of the words, "subject to my approval," was stated by Mr. Giltinan himself to be the annoyance which Mrs. Brennan suffered because of the representations of parties in Atlantic City "as to the danger she was in by my having full power of attorney to do as I pleased with her property." This makes it obvious that Mrs. Brennan was unwilling to allow Mr. Giltinan an absolute power to make a sale of her lands, and that the limitation requiring her approval was necessary to satisfy her mind. By the change, this written authority was so restrained that if Mr. Giltinan undertook to sell as Mrs. Brennan's agent he was thereafter obliged to subject his action to her approval. After this he testified that the same reasons led to the second call of Mr. Ferris (Mrs. Brennan's attorney), when the latter took away the paper, now one of limited authority only.

Mrs. Brennan is thus shown to have been unwilling that Mr. Giltinan should exercise the authority of an agent, even subject to her approval. Mr. Giltinan claims that the taking away of the paper authority was a withdrawal only of the Atlantic and Iowa avenue lot, and not of the California and Pacific avenue lot, now in question. But the paper, as charged by Mrs. Brennan, authorized him to sell both these tracts subject to Mrs. Brennan's approval, one no more and no less than the other. When it was taken away by Mr. Ferris

(Mrs. Brennan's representative), Mr. Giltinan testifies that Ferris "made no comments and no remarks, and told me nothing in regard to any change of sentiments or instructions." I think it must be taken that the withdrawal of this paper, which Mr. Giltinan defines in its original form to have been a full power of attorney, made an end of Mr. Giltinan's authority to sell any of the land described in it. The demand by the principal for the absolute delivery of her letter of attorney, and its surrender by the agent, must be held to be a revocation. But even if this taking away of the written authority is held not to have removed the California and Pacific avenue lot from Mr. Giltinan's control, whatever power he retained under it must certainly have been subject to her approval under the previous modification. * * *

There is no dispute between the parties as to the order of time in which the events narrated happened. Irrespective of questions as to the existence or extent of Mr. Giltinan's authority to act as agent of Mrs. Brennan in the premises, and to bind her, without her previous approval, by a contract to sell, it appears that Mrs. Brennan had herself entered into a contract with Crosby to sell him the property, and had accepted $500 payment on account of the purchase money, before Giltinan, acting as her agent, had made any agreement whatever with Mr. Kelly, or had even heard from him that he was willing to pay the full price. The letters and telegrams and checks produced support the statement that the sale by Mrs. Brennan to Crosby's agent preceded the sale by Giltinan to Kelly beyond any doubt whatever.

When Mrs. Brennan, the principal, contracted with Crosby, that act of itself stripped her agent, if she had one, of all power to make another contract in derogation of that entered into by his principal. The agent could have no greater authority than the principal, and, the latter having disposed of the subject-matter of the agency, the power of the agent to act any further in the premises was at once ended. When Giltinan, as agent for Mrs. Brennan, undertook to deal with Kelly, the lot had already been sold by Mrs. Brennan, and partly paid for, and consequently this later transaction was of no force.

The complainant's charge against the defendant Crosby is that he, knowing of the complainant's previous purchase, entered into a pretended contract on the following day to buy the property from Mrs. Brennan; and her prayer is that her contract with Mrs. Brennan, obtained as set out in the bill from Mr. Giltinan, may be specifically enforced by a conveyance, etc., upon payment of price, etc., mortgage made, etc. Crosby denies this charge by his answer, and sets up his own agreement made with Mrs. Brennan by his agent Devine as prior in point of time, and without notice of any agreement of complainant.

The issue presented between these parties is, then, simply and only whether Crosby, after complainant had obtained her agreement, and having knowledge of this fact, secured another from Mrs. Brennan in favor of himself. The complainant thus bases her whole complaint against Crosby solely upon her alleged priority in securing her own contract. The review of the evidence above given shows that the agreement which Devine, Crosby's agent, procured for him in Philadelphia was in fact made before the contract between Kelly and Mr. Giltinan in Atlantic City, though on the same day. The supplemental and fuller agreement with Crosby was signed by him on the same day in Atlantic City, and perfected on the following Monday in Philadelphia by Mrs. Brennan. It is also shown that the Kelly contract, by reason of the lack of authority of Mr. Giltinan at the time of making it to bind Mrs. Brennan, is of no force to enable the complainant to maintain her bill and entitle her to the relief she asks against either defendant.

I will advise a decree dismissing the complainant's bill, with costs.

GILBERT v. HOLMES.

(Supreme Court of Illinois, 1871. 64 Ill. 548.)

Bill by Holmes to foreclose an instrument in the nature of a mortgage on account of a condition broken and forfeiture of the estate, and to redeem what was alleged to be a senior mortgage. One Preschbaker, the owner of the lands in question, in 1850 gave an absolute deed of them to Feaman and Gilbert, and received back a bond for the reconveyance of the land upon his paying to them, within 2 years, $3,000. The deed and bond were at once recorded. Preschbaker abandoned the lands and went to California. In 1858 Holmes secured from Preschbaker a letter of attorney authorizing him to redeem the lands, by suit or otherwise, in Preschbaker's name, the latter giving bond in penalty of $5,000 to convey to Holmes one-half of all lands he might recover. These instruments were not recorded. The same year Holmes began suit, which was decided adversely to him in the Circuit Court. Holmes said nothing as to an appeal or suing out a writ of error. In 1861 one Morrison bought the lands, and in 1863 Holmes prosecuted a writ of error to the above decree out of the Supreme Court, wherein the decree of the Circuit Court was reversed on the ground that Preschbaker's deed, being intended as security, must be regarded as a mortgage. In January, 1864, Holmes procured from Preschbaker the instrument on which this suit is brought, viz., a conveyance of the lands subject to become void if Preschbaker should keep his original agreement with Holmes. In September, 1864, Preschbaker for $2,500 quitclaimed the lands to Gilbert, and authorized Gilbert to dismiss the suit instituted by Holmes in Preschbaker's name.

The suit was dismissed, and Holmes now files this suit in his own name.

McALLISTER, J.[27] [After stating the facts and holding that Holmes's power of attorney and mortgage so called were merely champertous contracts:] * * * But there is still another view, which, if we are correct in regard to it, will show that, upon strict principles of law, there is no foundation for his suit.

It is an indispensable prerequisite to the right of Holmes to a foreclosure under his deed in the nature of a mortgage, as his counsel characterizes the instrument, that there should be a breach of condition, which would operate to work a forfeiture and make the estate absolute.

This proposition, we apprehend, cannot be successfully controverted. Then, upon any fair construction of the terms contained in the condition, what would constitute such a breach?

The covenant, the performance of which that instrument was intended to secure, was, that Preschbaker would convey by valid deed to Holmes one-half of all of said lands, which Holmes might redeem or recover to Preschbaker by virtue of the power of attorney, when the same should be so redeemed or recovered.

Until Holmes exercised the power given by the letter of attorney, and by its exercise redeemed or recovered some portion of the lands to Preschbaker, the latter was under no duty or obligation to convey to the former, for, until then, Holmes was entitled to no interest in the lands.

There is no ground for the pretense that Holmes, at the time he commenced suit for foreclosure, had redeemed or recovered any portion of the land by virtue of the power of attorney or otherwise.

There was no covenant or stipulation contained in any of the instruments given by Preschbaker to Holmes that the power should be irrevocable. If, therefore, there was nothing in its nature which would render it irrevocable, Preschbaker was at liberty to revoke it at his will and pleasure, and if so, the exercise of that right could not constitute a breach of the condition contained in the deed of January 6, 1864.

The letter of attorney was not given to secure money loaned, and was not, by its terms, irrevocable, or made so by the terms of either of the other writings. It was not a power coupled with an interest; because, by it, and the contemporaneous agreement, Holmes was simply to have an interest in the proceeds arising from the execution of the power.

The case of Bonney v. Smith, 17 Ill. 531, is a direct authority for holding the power, in the case at bar, to be revocable at the will of the principal. Nor was this quality changed by the deed of January 6, 1864. That was given merely to secure the performance by Preschbaker of the original bargain to convey one-half the lands which

[27] Part of the opinion is omitted.

Holmes might redeem or recover, to the former, by virtue of the letter of attorney, leaving it to the volition of Holmes to act under the power, and of Preschbaker to continue it. By this writing no new terms were added to the original bargain; the power was not annexed to the estate, nor was the estate auxiliary to its exercise. It was not a power coupled with an interest before, and it remained the same after that deed was made.

It was originally a mere common law authority in Holmes to do certain acts for and in the name of his principal, and the deed, without superadding any new terms, is given solely with reference to this pre-existing transaction, and to secure to Holmes the fruits arising from the exercise of the power, if he should choose to exercise it. The exercise of the power by him was an indispensable condition precedent to the estate ever becoming absolute in him.

With these several instruments before him, would any good lawyer contend that Holmes could exercise the power conferred by that letter of attorney in his own name, or that he had an interest which he could convey to a third person, and the assignee exercise the power in his own name? Yet all these consequences would follow, if Holmes had a power coupled with an interest, as that term is understood from the books. Strother v. Law, 54 Ill. 413.

"A power, coupled with an interest, must create an interest in the thing itself upon which the power is to operate. The power and estate must be united, or be co-existent, and this class of powers survive the principal, and may be executed in the name of the attorney." Bonney v. Smith, supra, and authorities there cited.

By the express terms of the condition, the lands must have been recovered to Preschbaker before he was under any obligation to convey any part to Holmes, and everything was to be done in Preschbaker's name.

What is there in the terms, or legal effect of these writings, between Preschbaker, the principal, and Holmes, the agent, to tie the hands of the principal so as to prevent him from parting with the subject-matter of the agency?

Counsel for Holmes has failed to point out anything, and we can perceive nothing of the kind. That being the case, then, when Preschbaker, as principal, assumed to act in that behalf, and sold and conveyed his equity of redemption to Gilbert for a valuable consideration, thus parting with all his right in or control over the subject-matter of the agency, this was such a termination of his own authority, as, by operation of law, terminated that of the agent also.

This doctrine is also forcibly stated by Story, in his work on Agency, § 481: "A revocation, by operation of law, may be, by a change of condition, or of state, producing an incapacity of either party. This proceeds upon a general rule of law, that the derivative authority expires with the original authority from which it proceeds. The power of constituting an agent is founded upon the right of the principal to do

the business himself; and when that right ceases, the right of creating an appointment, or continuing the appointment of an agent already made, for the same purpose, must cease also. In short, the derivative authority can not, generally, mount higher, or exist longer, than the original authority."

A summary of this view is, that the conveyance in the nature of a mortgage is the foundation of this suit, and it is virtually a suit to foreclose that mortgage and redeem from an alleged prior one; that, in order to such foreclosure, there must be a breach of the condition—a forfeiture of the estate to the mortgagee; that such a breach could only occur after the mortgagee had redeemed, or, by action in mortgagor's name, recovered the lands, or some portion thereof, to the mortgagor by virtue of the power of attorney; that the power thereby given was not coupled with an interest, nor was the principal restrained, by anything in the writings, from doing the business himself, or disposing of the subject-matter of the agency, or, in other words, from revoking the power; that, by the sale and conveyance of the lands, the subject-matter of the agency, the principal terminated his own authority or control over it; that such exercise and termination of his own authority being but the exercise of a legal right in the principal, it gave a good title to Gilbert as against Holmes, the agent, and operated as a revocation of the derivative authority of the latter, so that there was no breach of the condition contained in the so-called mortgage, and consequently, no forfeiture of the estate to Holmes.

We are, therefore, of opinion that the decree of the circuit court should be reversed and the bill dismissed.

Decree reversed.

(H) Notice of the Revocation

———— v. HARRISON.[28]

(Court of King's Bench at Nisi Prius, 1699. 12 Modern, 346.)

A servant had power to draw bills of exchange in his master's name, and afterwards is turned out of the service.

HOLT, Chief Justice. If he draw a bill in so little time after that the world cannot take notice of his being out of service, or if he were a long time out of his service, but that kept so secret that the world cannot take notice of it, the bill in those cases shall bind the master.

[28] This case was quoted with approval in Morgan v. Stell, 5 Bin. 305 (1812) in which it was held that the same rule as to notice applies to sales of land by an agent that Lord Holt and the civil law (Pothier on Obligations, Nos. 79, 80, 81, 448) applied to the sale of personal effects.

LOOMIS ads. ————.

(Supreme Court of Judicature of New York, 1839. 19 Wend. 641.)

Motion by defendant to set aside report of referees, on the ground that neither a *replication* to a plea of payment, or a *notice of hearing* had been served. The defendant, who is an attorney, defends in person. Pending the suit he appointed a new law agent in Albany, without notice to the first agent that his services were no longer required. The plaintiff's attorney not being informed of the change, continued to serve papers on the old agent, who being also ignorant of the change, received and forwarded papers as usual, and among others, received the replication and notice of hearing in question. These papers, though forwarded did not reach the defendant.

BRONSON, J. Parties are not bound to search the agency book *every time* they serve a paper. When these proceedings were commenced, Mr. Dean was the defendant's law agent, and the plaintiff's attorney was regular in continuing to serve papers upon him, so long as he acted as agent. If the defendant had advised Mr. Dean that he had appointed a new agent and no longer desired his services, Mr. Dean would not have received the papers, and would have told the plaintiff's attorney of the change. The accident which has happened is chargeable to the defendant's own neglect. But he swears to merits, and must be relieved on payment of costs.

Ordered accordingly.

BURCH v. AMERICUS GROCERY CO.

(Supreme Court of Georgia, 1906. 125 Ga. 153, 53 S. E. 1008.)

EVANS, J.[29] The Americus Grocery Company sued J. B. Burch for a balance alleged to be due on open account. The only item in dispute was one of May 8, 1903, for a certain quantity of tobacco. The defendant contended that this item was purchased by his clerk, Mike Burch, after he had left his employment, and that he neither authorized nor ratified the purchase nor received the tobacco. On the other hand, the plaintiff insisted that Mike Burch was the general agent of the defendant in the management of his store, and as such, on previous occasions, had ordered goods of plaintiff on defendant's account, and that the plaintiff, without notice that Mike Burch was no longer employed by the defendant, took the order in the defendant's name and shipped the goods to the defendant, as was usual in the past transactions. On the trial it appeared that the defendant operated a sawmill and in connection therewith conducted a store or commissary. The commissary was in the charge of Mike Burch, who purchased all the merchandise therein sold and managed the business.

[29] Part of the opinion is omitted.

On former occasions, the plaintiff had sold merchandise to the defendant upon the order of his agent, Mike Burch.

When the merchandise, to recover the price of which the present action was brought, was ordered of the plaintiff by Mike Burch, he was not in the employment of the defendant, and had not been for two months past. Neither the plaintiff company nor its "drummer" was aware at the time of receiving the order that Mike Burch was no longer in the service of the defendant. The plaintiff's salesman called at the commissary of the defendant and asked for Mike Burch, as he had always done, and was informed that Mike Burch was about three miles away, superintending the putting down of a sawmill. There he found him and took the order for the merchandise. It was shipped to the defendant and the bill of lading was mailed to him. The defendant testified that the goods were never received by him, but were taken possession of by Mike Burch without his knowledge, and that he never received the bill of lading for the goods. Upon these facts the jury returned a verdict in favor of the plaintiff for the value of the goods, which verdict the trial judge refused to set aside on motion for a new trial.

1. In the management of the business of the commissary, the agent, Mike Burch, had general powers. Relatively to this business, he was the general agent of the defendant in the purchase of merchandise. "Whenever a general agency has been established for any purpose, all persons who have dealt with such agent, or who have known of the agency and are apt to deal with him, have a right to presume that such authority will continue until it is shown to have been terminated in one way or another; and they also have a right to anticipate that if the principal revokes such authority, they will be given due notice thereof. It is a general rule of law, therefore, upon which there seems to be no conflict of authorities, that all acts of a general agent within the scope of his authority, as respects third persons, will be binding on the principal, even though done after revocation, unless notice of such revocation has been given to those persons who have had dealings with and who are apt to have other dealings with the agent upon the strength of his former authority." [80] 1 Clark & Skyles on Agency,

[80] Accord: Insurance Co. v. McCain, 96 U. S. 84, 24 L. Ed. 653 (1877); Claflin v. Lenheim, 66 N. Y. 301 (1876); McNeilly v. Continental Life Ins. Co., 66 N. Y. 23 (1876), cited in Stevens v. Schroeder, 40 App. Div. 590, 58 N. Y. Supp. 52 (1899); Ulrich v. McCormick, 66 Ind. 243 (1879).

Notifying the agent, but leaving in his hands a written power, will not protect the principal as to third persons relying on the power and having no notice of the revocation. Beard v. Kirk, 11 N. H. 397 (1840). And the same result follows when the agent has had *general employment*. Tier v. Lampson, 35 Vt. 179, 82 Am. Dec. 634 (1862). In Williams v. Birbeck, Hoffman, Ch. 359 (1840), may be found a useful survey of the early cases, especially as to what constitutes a sufficient notice, from which the Court deduces the rule that every case must stand on its peculiar facts to show whether the third person knew of the revocation, and "whatever is sufficient to put him upon inquiry is equivalent to actual notice."

In Perrine v. Jermyn, 163 Pa. 497, 30 Atl. 202 (1894), it is said that no-

§ 173 (b). This rule was stated and applied in Thompson v. Douglass, 64 Ga. 57.

The obligation resting upon the principal of giving notice of the revocation of the authority conferred upon his agent has been analogized to the duty which the law imposes upon the members of a partnership to give due notice of its dissolution to creditors and the public at large. Claflin v. Lenheim, 66 N. Y. 301; 1 Parsons on Contracts (9th Ed.) 72, and citations. Where there is no attempt at all to comply with this duty, a retiring partner is to be held liable for the debts of the partnership, created after he ceased to be a member thereof, unless he shows that notice of his retirement had been brought home to the persons who subsequently became its creditors. Ewing v. Trippe, 73 Ga. 776; Pyron v. Ruohs, 120 Ga. 1064, 48 S. E. 434, and cit. Actual notice alone will affect creditors of the firm. Askew v. Silman, 95 Ga. 678, 22 S. E. 573; Camp v. Southern Banking Co., 97 Ga. 582, 25 S. E. 362. And like notice must be shown before one who has revoked the authority conferred upon his general agent will be at liberty, relatively to persons who have dealt with such agent upon the faith of his authority as recognized by his principal in the past, to repudiate a contract made in behalf of the principal by the agent after his authority has been revoked. Braswell v. Insurance Co., 75 N. C. 8; 1 Parsons on Contracts (9th Ed.) 71. The term "actual notice" is intended to be understood in its strictly legal, technical sense, and is not to be confounded with actual knowledge, which, as was pointed out in Clarke v. Ingram, 107 Ga. 570, 33 S. E. 802, is by no means a synonymous or interchangeable term. "Notice is actual when one either has knowledge of a fact or is conscious of having the means of knowledge, although he may not use them." It may be either "express notice," or simply "implied notice"; notice communicated by direct and positive information from persons cognizant of the fact, or notice such as "arises when the party to be charged is shown to have had knowledge of such facts and circumstances as would lead him, by the exercise of due diligence, to a knowledge of the principal fact." Id. 571.

In the present case no express notice was shown, and the controlling issue was whether or not the plaintiff had "implied notice" that there had been a revocation of the agency, within the meaning of Civ. Code 1895, § 3933, which declares that: "Notice sufficient to excite attention and put a party on inquiry is notice of everything to which it is afterwards found such inquiry might have led. Ignorance of a fact,

tice of the revocation of an agency may be shown by written or oral communication to the agent, or by circumstances and a course of dealing incompatible with the want of it. If the evidence is conflicting the jury must decide.

In a special agency, under authority to do a single act, no notice of revocation is necessary, and a revocation will be implied from a disposition of the subject-matter of the agency. Donnan v. Adams, 30 Tex. Civ. App. 615, 71 S. W. 580 (1902).

due to negligence, is equivalent to knowledge in fixing the rights of parties." The only circumstance upon which the defendant could rely as suggesting the necessity of making inquiry whether the agency had been terminated was that the order for the goods was given to the plaintiff's salesman three miles from the defendant's store, where the agent had been employed. The defendant was engaged in the sawmill business, and his "commissary" was run in connection with that business, as an adjunct to it, and not as a wholly independent enterprise. When the order for the goods was taken, Mike Burch, who still assumed to act as the defendant's agent, was superintending the erection of a sawmill. That it did not belong to the defendant or was not to be used in connection with his business was not self-apparent, nor was the fact that Mike Burch was not at the time engaged in his customary duties at the commissary calculated to put the plaintiff's salesman on notice that he had left the service of the defendant.

Moreover, the salesman had first driven by the store of the defendant and inquired for Mike Burch, who had theretofore been in charge of it. Instead of being notified that Mike Burch was no longer in the defendant's employ, the salesman was told where Mike Burch could be found. Under these circumstances it is not strange that the salesman should assume that the employés at the store of the defendant understood that he had called on business, as theretofore, and wished to see the defendant's representative, nor is it remarkable that, after being informed as to his whereabouts but given no intimation that he was no longer the defendant's agent, the drummer should entertain no doubt as to the continuance of the general agency. The jury, after considering all the facts and circumstances brought to light at the trial, found against the contention of the defendant that due caution and prudence on the part of the plaintiff's drummer ought to have suggested to him the propriety of making inquiry, if he did not divine the truth.

The burden of proof was upon the defendant to establish his defense that the plaintiff was affected with implied notice. McLean v. Camak, 97 Ga. 812, 813, 25 S. E. 493; English-Am. Loan Co. v. Hiers, 112 Ga. 823, 38 S. E. 103. The plaintiff being a creditor of the defendant and having had numerous business transactions with his accredited agent was entitled to receive a formal notification from him of the termination of the agency, or the legal equivalent of such a notification. The plaintiff could not in good faith remain passive, so long as the defendant failed in his legal duty to take active measures to impart notice. Camp v. Banking Co., 97 Ga. 586, 25 S. E. 362. "If one of two innocent parties must suffer by the act of a third party" assuming to act as an agent of one of them, "he who put it in the power of such third party to do the wrongful act must suffer the loss, rather than the other innocent party who would be a victim without any fault on his part." Blaisdell v. Bohr, 77 Ga. 382. The de-

fendant was admittedly at fault, having failed to take any steps to give notice to the plaintiff, whereas the plaintiff had not omitted to perform any legal duty owing to the defendant, and the plaintiff's drummer admittedly acted in entire good faith.

The jury took the view that the plaintiff should not be called on to suffer the loss. "In this there is no hardship upon the defendant," as was pointed out by Rapallo, J., in Claflin v. Lenheim, supra, who added that it was the defendant's duty, "after he had accredited his brother for a series of years as authorized to deal in his name and on his responsibility, when he terminated that authority, to notify all parties who had been in the habit of dealing with his agent, as the plaintiffs had been to his knowledge. This was an act easily performed, and would have been a perfect protection to him and prevented the plaintiffs from being deceived. Justice to parties dealing with agents requires that the rule requiring notice in such cases should not be departed from on slight grounds, or dubious or equivocal circumstances substituted in place of notice. If notice was not in fact given, and loss happens to the defendant, it is attributable to his neglect of a most usual and necessary precaution." The verdict of the jury appears to be in accord both with the strict law and the common justice of the case, and it should not be set aside unless the court below committed some error which was obviously calculated to bring about a result which would not otherwise have been probable. * * *

Judgment affirmed.

KELLY v. PHELPS.

(Supreme Court of Wisconsin, 1883. 57 Wis. 425, 15 N. W. 385.)

Action by an agent for commissions on sales of wood for the principal. The first commission to the agent was modified by later letters, and defendant testified that on March 31st he revoked the authority. This plaintiff denies. On April 11th he made a written contract for the sale of the last of the wood.

LYON, J. The authority to the plaintiff to sell the defendant's wood is found in the letter of the defendant of February 13th, the price being modified by the letter of March 2d. The testimony tends to show that plaintiff made contracts for the sale of 500 cords before any further modification of plaintiff's authority was attempted. It is contended on behalf of the defendant that the letter of March 26th required the plaintiff to sell all of the wood in one lot, and consequently deprived him of authority to dispose of the same in parcels. If that is so, it could have no effect upon sales made before that letter was received. The previous letters, under which it is claimed that the 500 cords were sold to Case & Co. and Billings, contained no such restriction upon the power of the plaintiff, and if he made those sales, as he claims, he is entitled to his commission thereon. But we do not

think the letter of March 26th admits of the construction contended for. We think the fair and reasonable construction of it is that the dry and green wood should be sold together in such proportions, that the whole of the wood should be sold at the specified prices. The dry wood being the most valuable and finding a readier sale, would, if sold with it, facilitate the sale of the green wood. This, we think, is the plain and obvious meaning of the letter of March 26th.

If the plaintiff produced customers ready and willing to purchase the wood at the specified prices before revocation of his authority, he is entitled to his commissions on the amount those customers would have taken, although the defendant refused to deliver the wood. To entitle him to his commission we do not think it essential that the plaintiff should have entered into written contracts for the defendant with such customers in order to bind them under the statute of frauds. It is sufficient if the customers were ready and willing to perform their verbal contract with the plaintiff to purchase the wood. It was substantially so held in the late case of O'Connor v. Semple, 57 Wis. 243, 15 N. W. 136.

Thus far our views seem to accord with those of the learned circuit judge, expressed in his instructions to the jury. But he gave one instruction which we think erroneous. It is in these words: "If the defendant revoked the agency of the plaintiff, and the plaintiff, notwithstanding such revocation, went on and completed the sale of the wood, and immediately thereafter notified the defendant thereof, the defendant was bound to give the plaintiff notice of his dissent within a reasonable time thereafter; otherwise he must be held to have acquiesced in and ratified the acts of the plaintiff, and will be liable for his commissions. Such dissent on the part of the defendant must have been clear and positive." This instruction applies the rule of law which binds the principal, in certain cases, to a third person for the acts of a former agent, whose agency has been revoked, to a controversy between the principal and such former agent.[31] If, after revocation, the former agent enter into a contract for the principal, within the scope of his original authority, with one who had dealt with the agent as such before the revocation, and who makes the contract in good faith, without notice of the revocation, the principal will be bound to such third party, or at least he will be bound unless he promptly repudiates the act of his former agent. The rule rests en-

[31] In Jones v. Hodgkins, 61 Me. 484 (1872), Story on Agency, § 470, is quoted to the effect that as to the agent the revocation takes effect from the time when it is made known to him; as to third persons when it is made known to them. If known to the agent, as against his principal his rights are gone, though he may still as to third persons who are ignorant of the revocation bind both himself and his principal. This statement is approved in Capen v. Pacific Mutual Ins. Co., 25 N. J. Law, 67, 64 Am. Dec. 412 (1855), and Lamothe v. St. Louis Marine Ry. & Dock Co., 17 Mo. 204 (1852). The revocation is operative from the time when it becomes known to the agent; if notice is sent by mail, not from the time of the dispatch of the letter, but from its receipt by the agent. Robertson v. Cloud, 47 Miss. 208 (1872).

tirely upon the good faith of the person so dealing with the former agent, and holds the principal to liability or to the duty of prompt action, because he had given credit to his agent by appointing him, and thus put it in the power of the latter to commit the fraud.

But when it comes to a transaction between the principal and the former agent, the reason of the rule utterly fails, and the rule has no application. Should a stranger, without authority, assume to act as the agent of another, it would be intolerable if such other would be bound to compensate the interloper for his services unless he gave the latter "notice of his dissent within a reasonable time thereafter." The law imposes no such obligation upon business men in respect to those who, without authority, interfere in their affairs. If the defendant revoke the authority of the plaintiff to sell wood for him, such revocation was a perpetual notice to the plaintiff that he dissented from each and every act of assumed agency, and as to him no other notice of dissent is required. The jury may have found the revocation, and still, under the instruction, the plaintiff would be entitled to recover commissions on the wood thereafter sold, because the defendant did not dissent when notified of the sale. This is error.

We think the record discloses another error, also fatal to the judgment. The plaintiff testified to an express contract that his commission on sales should be 5 per cent. This was substantially denied by the defendant. If the jury believed the testimony of defendant, the recovery would be quantum meruit. In this aspect of the case the defendant offered competent testimony of the customary commissions in procuring sales of wood. The testimony was rejected. It should have been admitted, to enable the jury to determine the amount of the recovery in case they found there was no express agreement as to commissions.

Other errors are assigned and have been argued by the respective counsel. It is not deemed necessary to consider them. The judgment of the circuit court is reversed, and the cause will be remanded for a new trial.

III. Abandonment by the Agent

(A) Power to Renounce

ELSEE v. GATWARD.

(Court of King's Bench, 1793. 5 Term R. 143, 101 Eng. Repr. 82.)

This was an action upon the case. The first count in the declaration stated that the plaintiffs on the 29th of August 1791 were about to build a warehouse &c. and to rebuild and repair certain parts of a dwelling house and stables &c. and were desirous of having the warehouse completely tiled and covered in, and the front of the dwelling

house rebuilt, on or before the first of November then next, and also of having the bricklayers' and carpenters' works of the warehouse completely finished on or before the first of December, and the whole of the remaining repairs finished on or before the 25th December then next, and thereupon the plaintiffs on the 29th of August 1791 at the special instance and request of the defendant, who was a builder, and had full notice of the premises, retained and employed the defendant to do and perform all and singular the bricklayers' and carpenters' works which should be requisite on the occasion aforesaid within the several times herein before mentioned for the completion thereof respectively; and although the defendant afterwards accepted of such retainer and employment upon the terms aforesaid, and could and ought to have completed all such bricklayers' and carpenters' works within the said respective times, yet the defendant contriving to injure the plaintiffs &c. did not, nor would, completely tile or otherwise cover in the said warehouse &c. on or before the said first of November, nor did nor would finish the bricklayers' and carpenters' works of the warehouse on or before the said 1st day of December, and the whole of the remaining repairs on or before the said 25th of December &c. but on the contrary permitted the said warehouse to continue untiled and uncovered &c. in consequence of which said neglect of the defendant the walls of the said premises were greatly sapped and rotted, and the ceilings damaged and spoiled, and the plaintiffs were obliged to continue tenants of another warehouse and stables &c. and were thereby put to additional expence &c. The second count stated that the plaintiffs on the 29th of August 1791, being possessed of divers old materials of buildings, retained and employed the defendant at his instance and request to do and perform certain bricklayers' and carpenters' works upon divers buildings and premises of them the plaintiffs, and to use and apply in and about those works all such parts of the old materials as were fit and proper for that purpose, and that although divers parts of the said old materials were fit and proper to have been used and applied in and about the said works, yet the defendant, contriving to injure the plaintiffs in this behalf, and to enhance the expence of the bricklayers' and carpenters' works, did not nor would use and apply in and about the said works such parts of the old materials as were fit &c. but refused so to do, and wrongfully and injuriously used and applied in and about the same works other new and expensive materials in the stead of such old materials as were fit and proper for the same purposes; whereby the plaintiffs were put to an unnecessary expence &c. and the old materials became wholly useless &c. There was a third count in trover for the old materials.

The defendant demurred to the two first counts; alleging for causes that, notwithstanding the whole of the supposed causes of action in those counts were in the nature of a nonfeazance, and consisted in the non-performance of certain matters and things in those counts mentioned as having been omitted to be done by the defendant, it was not

stated in either of those counts, nor did it thereby appear that the defendant by any promise undertaking contract or agreement was bound to the performance of those several matters or things &c. That, although the several supposed causes of action in those counts were founded upon implied contracts in law, no sufficient ground or consideration to raise or support such implied contracts was stated. That there was not stated, nor did it appear, in those counts that there was any promise or contract on the part of the defendant, upon which the breaches in those counts could operate. And that those counts did not contain any cause of action against the defendant &c. The parties went to trial, when a verdict was given for the defendant on the count in trover, and conditional damages assessed for the plaintiffs on the two counts demurred to.

Lord KENYON, Ch. J. If this had been an action of assumpsit, it could not have been supported for want of a consideration; it would have been nudum pactum. And if both the counts be not good, the defendant is entitled to judgment. Now I do not think that the first count in the declaration is good in law. It states that the defendant, who is a carpenter, was retained by the plaintiffs to build and to repair certain houses; but it is not stated that he was to receive any consideration, or that he entered upon his work. No consideration results from his situation as a carpenter, nor from the undertaking: nor is he bound to perform all the work that is tendered to him; and therefore the amount of this is, that the defendant has merely told a falsehood, and has not performed his promise; but for his non-performance of it no action can be supported. This is warranted by Lord Holt's opinion in Coggs v. Bernard, 2 Ld. Raym. 919, where recognizing the case in 11 H. 4, 33, he said—"There the action was brought against a carpenter, for that he had undertaken to build the plaintiff a house within such a time, and had not done it, and it was adjudged the action would not lie." And on this opinion I think I may safely rely, especially as the justice of the case will not be altered by the form of the action; for if assumpsit will not lie in such a case, there is no technical reasoning that will support such an action as for a tort. In that case Powell, J., said—"An action will not lie for not doing the thing for want of a sufficient consideration; but if the bailee will take the goods into his custody, he shall be answerable for them; for the taking of the goods into his custody is his own act." Lord Holt there put several cases to establish this position, which will reconcile the cases now cited on the part of the plaintiffs. In Brown v. Dixon, 1 T. R. 274, the defendant had received the dog into his possession. This case is very distinguishable from those of common carriers and porters, from whose situations certain duties result; they are bound by law to carry goods delivered to them, and are by law entitled to a recompence; but no such duty results from the situation of a carpenter; he is not bound, as such, to perform all the work that is brought to him. It appears to me, therefore, that the first count cannot be supported, there being no consid-

eration expressly stated, nor any consideration resulting from the defendant's employment as a carpenter; though, had the defendant performed the work, he might have recovered a satisfaction on a quantum meruit. Upon the authority of Coggs v. Bernard, and the cases there noticed, not contradicted by any other decision, I think that the first count for nonfeazance is bad, but that the second count may be supported. It is there stated that the defendant entered upon his employment, and that he did not do that which he ought to have performed according to his retainer. In that count it is stated that he undertook to use the old materials, that in fact he did not use those, but substituted new ones in their stead, thereby enhancing the expence to the plaintiffs. This comes within the case mentioned by Lord Holt in Coggs v. Bernard, speaking of the same case in the year-books, "but there the question is put to the Court, what if he had built the house unskillfully; and it was agreed in that case an action would have lain:" for though the defendant could not have been compelled to build this house, and to use the old materials, yet having entered upon the contract, he was bound to perform it; and not having performed it in the manner proposed, an action lies against him.[32]

SECURITY TRUST & LIFE INS. CO. v. ELLSWORTH.

(Supreme Court of Wisconsin, 1906. 129 Wis. 349, 109 N. W. 125.)

Action to foreclose a mortgage given to secure a note, made as part of a contract between plaintiff company and defendant, by which defendant became the general agent of plaintiff company. The note was to be paid out of commissions and renewals to be earned by the agents, and represented money advanced to the agent and used by him to build up the business. Not being successful he resigned, and this suit is now brought to collect the note. Judgment for plaintiff and defendant appeals.

KERWIN, J.[33] [After holding that the agreement was that the mortgage debt should be paid out of renewals only, and that no demand was to be made in excess of renewals:] * * * 2. It is further contended by counsel for respondent that the withdrawal from the agency of Henry Ellsworth and his son put it out of their power to pay the debt provided in the contract, hence the debt became payable in the usual way. This involves the question of the right of the agent to resign, and whether or not if such right existed it was reasonably exercised. Both contracts of agency are silent as to the time they should remain in force, and both recognize the right of resignation by providing, "in case of the resignation or removal of the said agents, the said company may, and it is hereby authorized and empowered to

[32] The opinions of Ashhurst and Grose, JJ., are omitted.

[33] Part of the opinion is omitted.

pay such subordinate agents any commissions or other remuneration which said agents shall have agreed to pay such subordinate agents and to offset against all claims under this contract such commissions or other remuneration so paid." The general rule is that where there is no express or implied covenant to the contrary, the agent may resign at any time.[84] Mechem on Agency, § 233.

[84] In Duffield v. Michaels (C. C.) 97 Fed. 825 (1899) Jackson, J., summarized the rule: "It is a well settled principle of law that an agent may withdraw from the service of his principal at his pleasure, though he might be liable in some instances to damages for the violation of a contract, if any existed. Bish. Cont. par. 1050. * * * But it is an equally well settled principle of law that an agent may on account of the principal's wrongful conduct be justified in abandoning his contract and repudiating the agency." Cody v. Raynaud, 1 Colo. 272 (1871); Bishop v. Ranney, 59 Vt. 316, 7 Atl. 820 (1887); 1 Am. & Eng. Enc. Law (2d Ed.) 1110; Newcomb v. Insurance Co. (C. C.) 51 Fed. 725 (1892).

In U. S. v. Jarvis, 2 Ware (Dav. 274) 278, Fed. Cas. No. 15,468 (1846), Ware, District Judge, thus puts the law: "There is no doubt, as a general rule, that the appointment of an agent may at any time be revoked by the principal without giving a reason for it, because it is the right of every man to employ such agents as he sees fit. The agent also has the same general right to renounce the agency at his own will; for it is an engagement at the will of both parties. But the contract of agency, or mandate, involves mutual obligations between the parties; and these commence, if not as soon as the appointment is made, at least as soon as the agent or mandatary commences the execution of the agency. If he has entered on the business, even if he does not accomplish prosperously what he has undertaken, he will be entitled, from his principal, to an indemnity for his expenses and services, if the failure does not arise from his own fault. Dom. Lois Civiles, liv. 1, tit. 15, § 2, Nos. 1, 2. After he has engaged in the business of the agency, the principal may at any time revoke his powers and dismiss him from his service. But if his power is thus revoked, the principal will be responsible to him for any engagements he may have entered into, and any liabilities he may have incurred in good faith, in the proper business of the agency, before he had notice of the revocation. Id. § 4, No. 1. And so the agent, after entering on the business, may renounce the agency. But then this must be done in good faith, and be preceded by reasonable notice, or the agent will be liable to the principal for any loss that may result to him from this cause. The agent cannot withdraw himself from his engagement wantonly, and without reasonable cause, without rendering himself responsible for the consequences. Id. Nos. 3, 4; Poth. Mandat. No. 44; Dig. 17, 1, 22, § 11, Id. 1, 27, § 2. And when a man has undertaken an agency, he will not merely render himself liable for damages to his principal, if he renounces the agency without notice and without just cause, but a court of equity will go further. If an agent is employed to make a purchase, and, finding the speculation likely to prove profitable, he renounces the agency and purchases for himself, equity will hold him a trustee for the principal, and give him the benefit of the purchase directly, without putting him to an action for damages. 1 Story, Eq. Jur. § 316. It may be true that in our jurisprudence a precise authority may not be found for all these propositions among the adjudged cases. But they rest on such clear grounds of justice and good faith, that they may be well taken for granted without the authority of a direct decision (Story, Ag. § 467), and they all stand approved by the authorities of the Roman law. They all flow from a great principle of social justice. A man cannot, wantonly and without reasonable cause, retract or annul his own acts and change his purpose, when others, in the ordinary course of business and in good faith, have acquired an interest in them, to the injury of such persons, without rendering himself liable to repair such injury. The greatest of the Roman jurisconsults reduced the rule to a short and pithy maxim: No man can change his will to the injury of another. Dig. 50, 17, 75. 'Nemo potest mutari consilium suum in alterius injuriam.' It is applied

It is claimed, however, by counsel for respondent that there was an implied covenant on the part of the agents that they should not resign, and it is insisted that this covenant arises not only out of the fact of the existence of the indebtedness and the obligation to pay it, but as well out of the agreement on the part of the debtor implied in all such cases not to voluntarily put an end to the conditions upon which his agreement is of value to the creditor. This branch of counsel's contention, therefore, rests upon the assumption of implied covenant. Conceding for the sake of argument that the law would impose some obligation upon the agents not to unreasonably abandon their undertaking, still such rule must have a reasonable construction. If the law implied a covenant for the continuance of the agency, it would not extend beyond such time as was reasonably necessary to make an effort to successfully accomplish the purpose of the agency. Clearly, there was no implied covenant that the agency should be continued indefinitely when the continuance of it proved fruitless. If it were otherwise, the agents might be compelled to indefinitely continue the agency without profit to themselves or their principal. * * *

Reversed and remanded.

CANNON COAL CO. v. TAGGART.

(Court of Appeals of Colorado, 1891. 1 Colo. App. 60, 27 Pac. 238.)

Action by Taggart for $272.80, loaned the company. Defense of denials, and counterclaim for damages due to Taggart's breach of the contract to sell appellant's coal. Exceptions to instructions of the trial court.

in some cases where no previous engagements exist between the parties, but its application is peculiarly stringent when mutual obligations by contract do exist. 'If I agree with a mechanic,' says Pothier, 'to build me a house, and after the agreement I change my purpose and determine not to build, I may dissolve the engagement by giving him notice of the change of my will; but if before the notice he has purchased materials for the work and engaged workmen, I shall be bound to indemnify him for the loss he sustains by the change of my purpose.' Contrat de Louage, No. 440; 19 Duvergier, Droit Civil Francais, § 370. If this was a case between two private persons, the case put by Pothier would differ in no essential particulars from the present. Both are contracts of hiring; for the contract with a salaried agent or mandatary is essentially a contract of hiring, though in some respects distinguishable from the common contract for the hire of labor. Id. tit. 8, c. 3. The defendant was a salaried agent, and he had, for the sole purpose of the agency and for the sole benefit of his principal, hired an office. He held, as all agents do, the appointment at the will of the principal, and he is dismissed without notice, while under this liability for rent. If the engagement of his office was, as to the terms, reasonable and proper and in good faith, under the circumstances, the justice of the case appears to me so clear, that the very statement of the facts carries with it the answer, and that conforms to the well-established principles of law."

See, also, Hitchcock v. Kelley, 18 Ohio Cir. Ct. R. 808, at page 813, 4 O. C. D. 180.

BISSELL, J.[35] The right construction of the contract into which the parties entered will determine this appeal. The interpretations put on it by the trial court led to the giving of the instructions which are complained of. If it was a contract for the sale of personal property not in existence at the time of the bargain, and to be produced by the vendor, it would be necessary to decide whether such a sale carried with it an implied warranty that the goods sold were merchantable. The nisi prius court so regarded it, and told the jury that the coal must be of a merchantable quality, and, should they find otherwise, it would justify the defendant in refusing to receive the coal tendered. The matter was not put on the basis of a right to terminate the agency, which was created by the agreement, because of a breach of its terms by the principal, but on the theory of a sale, and a rejection of the goods. This was wholly unwarranted by the legal obligations which the parties were under, and by the case as it was made, and it must have misled the jury.

In no sense which permits the application of that rule can it be said that the contract was one of purchase and sale. There was no sale of a specific quantity of coal, or of the output of the mine. Taggart was not bound to buy a ton of coal. He might buy a thousand tons a month, all that the mine produced, or none. What he ordered he was bound to receive, and pay for at the price agreed on. In some respects, chiefly relating to the obligation to pay for what he might order, it was like a contract of sale. In the absence of an obligation to order, take, or purchase any amount, definite or indefinite, it lacked an element which always accompanies a contract of sale. The company was obliged to fill any orders which Taggart might send, to the extent of their output, at so much per ton. The correlative promise by Taggart was in reality the assumption of an agency to dispose, as far as he might be able, of what the company might produce. The pith of the agreement, which was of advantage to the coal company, was the contract to work up a trade for their coal, which Taggart assumed. His compensation was in the price at which he was permitted to buy. Any breach of this agreement by Taggart without a legal excuse would necessarily subject him to a liability enforceable by action.

The time specified in the contract for the duration of the agency is not essential to the liability. As a general thing, an agent may at any time renounce his employment, but he must do it in good faith, and in such fashion as not to injure his principal. When once he has entered on his employment, he may not renounce it without reasonable cause; and, failing in this, he will render himself liable for the consequences. Story, Ag. § 478; White v. Smith, 6 Lans. 5; U. S. v. Jarvis, 2 Ware (Dav., 274) 278, Fed. Cas. No. 15,468; Elsee v. Gatward, 5 Term R. 143. When the agreement is that he shall continue

[35] Part of the opinion is omitted.

for a definite period, and he commences to do what he has promised, a fortiori will he be liable to respond in damages if he break his engagement without legal excuse. * * *

Reversed.

(B) Remedies for Abandonment by the Agent

WM. ROGERS MFG. CO. v. ROGERS.

(Supreme Court of Errors of Connecticut, 1890. 58 Conn. 356, 20 Atl. 467, 7 L. R. A. 779, 18 Am. St. Rep. 278.)

Injunction to restrain defendant from leaving employment of plaintiffs, or engaging in other business in violation of a contract to act for 25 years as agent and manager of plaintiff's business. It is averred that defendant is now, after 14 years, negotiating with other persons, competitors of plaintiffs, to leave the employ of plaintiffs, and to give to these rivals his services, and the use of his name on the stamp of silver plated ware to be made by such rivals.

ANDREWS, C. J. Contracts for personal service are matters for courts of law, and equity will not undertake a specific performance. 2 Kent, Comm. 258, note b; Hamblin v. Dinneford, 2 Edw. Ch. 529; Sanquirico v. Benedetti, 1 Barb. 315; Haight v. Badgeley, 15 Barb. 499; De Rivafinoli v. Corsetti, 4 Paige, 264. A specific performance in such cases is said to be impossible because obedience to the decree cannot be compelled by the ordinary processes of the court.[86] Contracts for personal acts have been regarded as the most familiar illustrations of this doctrine, since the court cannot in any direct manner compel the party to render the service. The courts in this country

[86] Contracts involving the performance of a continuous and protracted series of acts, or of acts demanding the exercise of individual skill, taste, talent or discretion, are of necessity incapable of judicial supervision. For breach of such agreements the remedy is to be sought in an action at law. Thiebaud v. Union Furniture Co., 143 Ind. 340, 42 N. E. 741 (1895); Arthur v. Oakes, 63 Fed. 318, 11 C. C. A. 209, 25 L. R. A. 414 (1894). To enforce a contract for personal services would result in a state of slavery. In re Mary Clark, 1 Blackf. 122, 12 Am. Dec. 213 (1821). To attempt to enforce a contract demanding personal confidence would make that confidence impossible. Bourget v. Monroe, 58 Mich. 563, 25 N. W. 514 (1885). An early and interesting case in this country is De Rivafinoli v. Corsetti, 4 Paige, Ch. 264, 25 Am. Dec. 532 (1833), in which Chancellor Wolworth has humorously set forth the powerlessness of the law to realize the old adage that a bird that can sing and will not must be made to sing. He doubted that any officer of the court had that perfect knowledge of the Italian language, or that exquisite sensibility in the auricular nerve, requisite to enjoy with a proper zest the peculiar beauties of the Italian opera. He also doubted the effect of coercion upon defendant's singing especially in the livelier airs, though admitting that fear of that dismal cage, the debtor's prison, would deepen his seriousness in the graver parts of the drama. See, also, Hamblin v. Dinneford, 2 Edw. Ch. 529 (1835). In Roquemore v. Mitchell, 167 Ala. 475, 52 South. 423, as reported in 140 Am. St. Rep. 52 (1910), is an extended note on the whole subject.

and in England formerly held that they could not negatively enforce the specific performance of such contracts by means of an injunction restraining their violation. 3 Wait, Act. & Def. 754; Marble Co. v. Ripley, 10 Wall. 340, 19 L. Ed. 955; Burton v. Marshall, 4 Gill, 487, 45 Am. Dec. 171; De Pol v. Sohlke, 30 N. Y. Super. Ct. 280; Kemble v. Kean, 6 Sim. 333; Baldwin v. Society, 9 Sim. 393; Fothergill v. Rowland, L. R. 17 Eq. 132.

The courts in both countries have, however, receded somewhat from the latter conclusion, and it is now held that where a contract stipulates for special, unique, or extraordinary personal services or acts, or where the services to be rendered are purely intellectual, or are peculiar and individual in their character, the court will grant an injunction in aid of a specific performance. But where the services are material or mechanical, or are not peculiar or individual, the party will be left to his action for damages. The reason seems to be that services of the former class are of such a nature as to preclude the possibility of giving the injured party adequate compensation in damages, while the loss of services of the latter class can be adequately compensated by an action for damages. 2 Story, Eq. Jur. § 958a; 3 Wait, Act. & Def. 754; 3 Pom. Eq. Jur. § 1343; California Bank v. Fresno Canal, etc., Co., 53 Cal. 201; Singer Sewing Machine Co. v. Union Button Hole Co., Holmes, 253, Fed. Cas. No. 12,904; Lumley v. Wagner, 1 De Gex, M. & G. 604; Railroad Co. v. Wythes, 5 De Gex, M. & G. 880; Montague v. Flockton, L. R. 16 Eq. 189.

The contract between the defendant and the plaintiffs is made a part of the complaint. The services which the defendant was to perform for the plaintiffs are not specified therein, otherwise than that they were to be such as should be devolved upon him by the general manager; "it being understood that such duties may include traveling for said companies whenever, in the judgment of said general agent, the interests of the business will be thereby promoted;" and also "including such duties as traveling for said companies as said general agent may devolve upon him, including also any duties as secretary or other officer of either or both of said companies as said companies may desire to have him perform." These services, while they may not be material and mechanical, are certainly not purely intellectual, nor are they special, or unique, or extraordinary; nor are they so peculiar or individual that they could not be performed by any person of ordinary intelligence and fair learning. If this was all there was in the contract it would be almost too plain for argument that the plaintiffs should not have an injunction.

The plaintiffs, however, insist that the negative part of the contract, by which the defendant stipulated and agreed that he would not be engaged in or allow his name to be employed in any manner in any other hardware, cutlery, flatware or hollow-ware business, either as a manufacturer or seller, fully entitles them to an injunction against

its violation. They aver in the complaint, on information and belief, that the defendant is planning with certain of their competitors to engage with them in business, with the intent and purpose of allowing his name to be used or employed in connection with such business as a stamp on the ware manufactured; and they say such use would do them great and irreparable injury. If the plaintiffs owned the name of the defendant as a trade-mark, they could have no difficulty in protecting their ownership; but they make no such claim, and all arguments or analogies drawn from the law of trade-marks may be laid wholly out of the case.

There is no averment in the complaint that the plaintiffs are entitled to use, or that in fact they do use, the name of the defendant as a stamp on the goods of their own manufacture, nor any averment that such use, if it exists, is of any value to them. So far as the court is informed, the defendant's name on such goods as the plaintiffs manufacture is of no more value than the names of Smith or Stiles or John Doe. There is nothing from which the court can see that the use of the defendant's name by the plaintiffs is of any value to them, or that its use as a stamp by their competitors would do them any injury other than such as might grow out of a lawful business rivalry. If by reason of extraneous facts the name of the defendant does have some special and peculiar value as a stamp on their goods, or its use as a stamp on goods manufactured by their rivals would do them some special injury, such facts ought to have been set out so that the court might pass upon them. In the absence of any allegation of such facts we must assume that none exist.

The plaintiffs also aver that the defendant intends to make known to their rivals the knowledge of their business, of their customers, etc., which he has obtained while in their employ. But here they have not shown facts which bring the case within any rule that would require an employé to be enjoined from disclosing business secrets which he has learned in the course of his employment, and which he has contracted not to divulge. Peabody v. Norfolk, 98 Mass. 452, 96 Am. Dec. 664.

There is no error in the judgment of the superior court. The other judges concurred.

HARLOW v. OREGONIAN PUB. CO.

(Supreme Court of Oregon, 1904. 45 Or. 520, 78 Pac. 737.)

Action by Harlow, as successor to the rights of one Southworth, by injunction to restrain defendants from refusing to carry out a contract, making Southworth the subscription agent in certain territory of the defendant's paper. Suit dismissed.

BEAN, J. 1. Assuming, for the purposes of the opinion, that the plaintiffs have legally succeeded to the rights of Southworth under the

original contract, and stand in his place and stead, entitled to all the rights and privileges given him by its terms, and that it embraces all the territory claimed by them, there are two reasons why this suit could not be maintained after the repudiation of the entire contract by the defendants, and the service on the plaintiffs of notice to that effect in June, 1902: First, the plaintiffs, if they are entitled to any relief at all, have a full and complete remedy at law; and, second, the remedy by injunction or specific performance is not mutual. It could not be invoked by the defendants against the plaintiffs, as the contract is not, and never was, capable of being specifically enforced or enjoined at the suit of Pittock or the defendant publishing company. The contract between Pittock and Southworth created substantially the relation of employer and employé, and this relation continued as to those who succeeded to Southworth's interest. By its terms, Southworth (whom we shall hereafter assume includes parties who have legally succeeded to his rights), was to carry and deliver the paper to all paying subscribers within the designated territory, to endeavor to increase its circulation, to collect subscriptions therefor, and to pay weekly for all papers he took from the office, receiving as a compensation for "his labor" a certain proportion of the subscription price of the paper. This relationship was to continue until one party or the other considered a "separation necessary." In that event, if the parties were unable to agree upon "a proper method of doing so," each was to appoint one arbitrator, who, if they could not agree, should choose another, whose decision should be final.

There may be room for controversy as to the intent and meaning of the arbitration clause, but it seems to us that it was intended, in case either party should desire to terminate the contract, to provide a simple and inexpensive method or means by which its value to the other could be determined, and the amount to be paid, if any, by the one desiring the separation, ascertained. The contract was undoubtedly thought to be advantageous to both parties at the time it was made. Southworth paid $350 for the sole right to carry and deliver the papers, and to receive as a compensation therefor a certain portion of the subscription price. This he supposed to be a valuable right, and one which would increase largely in value, according to his industry and diligence in extending the circulation of the paper, and the character of the services which he should render to its patrons. Pittock, on the other hand, was contracting for the future circulation of his paper, and the collection of subscriptions therefor in the given territory, and this he undoubtedly believed to be of value to the paper. It was to protect these rights, and to prevent the termination of the contract by either without making compensation to the other, that the arbitration clause was inserted. This, it appears to us, is its true intent and meaning.

We cannot think, however, that the agreement contemplated that

the personal relationship between the parties should necessarily continue, against the will of either, until the amount of compensation should be ascertained in the manner therein provided. Either party could terminate the contract when he considered it necessary, but, if the parties were unable to agree as to the amount of compensation to be paid by one to the other on account of such separation, they were to submit that matter to arbitration, but not the right to terminate the contract. The provision as to the duration of the contract, and the method to be employed in separation, or for determining the value in case separation should be deemed necessary, did not prevent either party from dissolving the relation between them at any time, subject to liability to the other for such damages as he may have sustained if it was not done in the manner provided. The contract created such a relationship of trust and confidence between the parties that a court of equity will not compel a continuation thereof against the will of either, but will leave the injured party to his relief at law. The contract, by its terms, was subject to termination at any time; the party desiring the termination, however, to pay its value to the other. If the termination or separation took place in the manner provided, the value or amount to be paid would be ascertained and determined by arbitrators. If not, the party guilty of the breach would be liable in an action at law for damages, the same as for the breach of any other contract.

2. It follows, therefore, that whether the action of the defendant corporation in repudiating the contract and notifying the plaintiffs that it would no longer be bound thereby be deemed a separation within its terms, or a breach thereof, the effect was to terminate the contract; and the only question between the parties remaining for adjustment is the amount, if any, to be paid by the defendants to the plaintiffs on account of such separation or breach. That question is not cognizable by a court of equity. An injunction to restrain the breach of a personal contract, or one relating to personal property, or a mandatory injunction to compel specific performance of such a contract, will not be granted when the recovery of damages at law would adequately redress the impending injury. Chicago & A. R. Co. v. New York, Lake Erie & W. R. Co. (C. C.) 24 Fed. 516; Richmond v. Dubuque & Sioux City R. Co., 33 Iowa, 423; Port Clinton R. Co. v. Cleveland & Toledo R. Co., 13 Ohio St. 545; 26 Am. & Eng. Enc. Law (2d Ed.) 17. Indeed, the basis of equitable interference in cases of specific performance is a want of an adequate remedy at law. Mr. Waterman says: "A court of equity will not grant relief where the complaining party will not be deprived of any legal right by withholding it, unless he can show clearly that he is entitled to the relief sought. If the plaintiff has an adequate remedy at law, he must seek his redress there." Waterman, Spec. Per. § 9. The same rule is laid down by Judge Story, Mr. Fry, and Mr. Pome-

roy. 1 Story, Equity (10th Ed.) § 716; Fry, Spec. Per. § 12; Pomeroy, Spec. Per. (2d Ed.) § 24.

It is admitted, as we understand it, that a court of equity will not decree a specific performance of the contract in suit because it requires varied and continuous acts on the part of the defendants, but it is argued that it will enjoin the defendants from violating the contract by delivering papers, or causing them to be sold and delivered, within the territory embraced in plaintiffs' contract, until such time as the defendants take the proper steps provided in the contract for its termination. Although the remedy suggested is negative rather than affirmative, it is, in effect, a decree for the performance of the contract. Enjoining the defendants from delivering papers or causing them to be sold and delivered in the disputed territory would practically enforce the contract, and require them to furnish the papers to the plaintiffs to be so delivered. A prohibition preventing a violation of the contract by the defendants would in this case as effectually compel its performance as an affirmative order to that effect.

The leading case holding that, although a court of equity cannot compel the specific performance of a personal service contract, it may enjoin a violation of the negative provisions thereof, is that of Lumley v. Wagner, 1 De Gex, M. & G. 604. In that case the defendant had agreed with plaintiff to sing at his theater for a definite time, and not to sing elsewhere. She threatened to sing at another theater in violation of her contract. In a suit to enjoin her from so doing, the court held that it could not enforce the affirmative part of the contract, because it could not compel the defendant to sing, but it could and would enjoin and restrain her from singing elsewhere. In this case the contract was for a definite, fixed time, and plaintiff's remedy at law was manifestly inadequate, because the damages which would accrue to him by a violation of the contract by the defendant could not be ascertained with any certainty. The same is true of Singer Sewing Machine Co. v. Union Buttonhole Co., Holmes, 253, Fed. Cas. No. 12,904; Standard Fashion Co. v. Siegel-Cooper Co., 157 N. Y. 60, 51 N. E. 408, 43 L. R. A. 854, 68 Am. St. Rep. 749; Burlington v. Burlington Water Co., 86 Iowa, 266, 53 N. W. 246; and other cases cited by the plaintiffs.

4. We are therefore of the opinion that plaintiffs cannot maintain this suit, for the reasons stated. There is, however, another objection to the enforcement of the contract in equity at the suit of the plaintiffs, and that is because the remedy is not mutual, and defendants could not compel the plaintiffs to perform.[87] It is a fundamental rule of

[87] That the remedy must be mutual is held in Stanton v. Singleton, 126 Cal. 657, 59 Pac. 146, 47 L. R. A. 334 (1899), citing many cases; Cort v. Lassard, 18 Or. 221. 22 Pac. 1054, 6 L. R. A. 653, 17 Am. St. Rep. 726 (1889). That injunction is negative specific performance is held in Welty v. Jacobs, 171 Ill. 624, 49 N. E. 723, 40 L. R. A. 98 (1898), quoting Pomeroy, Eq. Jurisp.

equity that when, from the nature of the contract, it is incapable of being enforced against one party, that party is rendered equally incapable of enforcing it against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former. Unless a court of equity can execute the contract on both sides, it will generally not interpose in behalf of either party. To compel one to perform specifically, and send the other to a court of law to recover damages, would be in violation of the established principles of equity. Pomeroy, Spec. Per. (2d Ed.) § 165; Fry, Spec. Per. § 286; Waterman, Spec. Per. § 198; Marble Co. v. Ripley, 10 Wall. 339, 19 L. Ed. 955; Richmond v. Dubuque & Sioux City R. Co., 33 Iowa, 423; Tyson v. Watts, 1 Md. Ch. 13; Hoover v. Calhoun, 16 Grat. 109; Shenandoah Valley R. Co. v. Dunlop, 86 Va. 346, 10 S. E. 239; 26 Am. & Eng. Enc. Law (2d Ed.) 28.

Now, as we have already stated, among the stipulations in the contract for performance by Southworth are that he shall carry the paper faithfully and carefully to every paying subscriber in the district; that he will endeavor on all occasions to increase the circulation, and will procure as much advertising patronage as possible; that he will be responsible and pay weekly for all papers taken from the office; and that he will comply with all rules and regulations that the proprietor of the paper may see fit to adopt from time to time, not inconsistent with his contract. These provisions call for the performance of varied and continuous acts on the part of Southworth, requiring skill, energy, experience, judgment, and integrity. It will not be contended, we think, that a court of equity can or will decree the specific performance of such a contract, because the enforcement of its decree would require such constant superintendence as to make judicial control a matter of extreme difficulty, if not an impossibility. See authorities last cited.

For these reasons, the decree of the court below should be affirmed, and it is so ordered.

§ 1341. That may be the effect, but not of necessity. Injunction may merely prevent a wrong not capable of other adequate remedy, without resulting in performance of the contract, and so be justified even when the courts could not specifically enforce the agency. Standard Fashion Co. v. Siegel-Cooper Co., 22 Misc. Rep. 624, 50 N. Y. Supp. 1056 (1898), which held this was not a proper case for injunction, and was on this point overruled in 157 N. Y. 60, 57 N. E. 408, 68 Am. St. Rep. 753 (1898), 43 L. R. A. 854, with monographic note. This is especially applicable when one party has already performed. The remedy will then no longer lack mutuality. Singer Sewing Machine Co. v. Union Buttonhole Co., Holmes, 253, Fed. Cas. No. 12,904 (1873), a leading case. As to injunction to restrain an agent who has signed a contract that his services are unique, see Kupfersmith v. Hopper, 122 App. Div. 31, 106 N. Y. Supp. 797 (1907); Teske v. Dittberner, 70 Neb. 544, 98 N. W. 57, 113 Am. St. Rep. 802 (1903); Id., 65 Neb. 167, 91 N. W. 181, 101 Am. St. Rep. 614 (1902); Daly v. Smith, 49 How. Prac. 50 (1874), containing an elaborate review of the authorities.

SECTION 2.—BY OPERATION OF LAW

I. IN GENERAL

AHERN v. BAKER.

(Supreme Court of Minnesota, 1885. 34 Minn. 98, 24 N. W. 341.)

VANDERBURGH, J. The defendant, on the ninth day of September, 1884, specially authorized one Wheeler, as his agent, to sell the real property in controversy, and to execute a contract for the sale of the same. He in like manner on the same day empowered one Fairchild to sell the same land; the authority of the agent in each instance being limited to the particular transaction named. On the same day, Wheeler effected a sale of the land, which was consummated by a conveyance. Subsequently, on the tenth day of September, Fairchild, as agent for defendant, and having no notice of the previous sale made by Wheeler, also contracted to sell the same land to this plaintiff, who, upon defendant's refusal to perform on his part, brings this action for damages for breach of the contract.

This is a case of special agency, and there is nothing in the case going to show that the plaintiff (defendant?) would be estopped from setting up a revocation of the agency prior to the sale by Fairchild. A revocation may be shown by the death of the principal, the destruction of the subject-matter, or the determination of his estate by a sale, as well as by express notice. The plaintiff (defendant?) had a right to employ several agents, and the act of one in making a sale would preclude the others without any notice, unless the nature of his contract with them required it. In dealing with the agent the plaintiff took the risk of the revocation of his agency. 1 Pars. Cont. *71.

Order affirmed, and case remanded.

II. BY DEATH

HUNT v. ROUSMANIER'S ADM'RS.

(Supreme Court of the United States, 1823. 8 Wheat. 174, 5 L. Ed. 589.)

Bill to compel defendants to join in the sale of the brig Nereus and the schooner Industry. In the bill Hunt set forth that Rousmanier applied to him for a loan of $1,450, offering as security a bill of sale, or a mortgage of his interest in the brig Nereus. Counsel was consulted, and he advised that a power of attorney to sell the

ships in case of default was as effectual as, and simpler than, a mortgage, since it avoided any change in the papers of the vessels, or need to take possession of them when they came into port. The loan was made and such a power of attorney was made out to Hunt. On a later loan of $700, a similar power to sell the Industry was executed. Rousmanier died insolvent, and defendants forbade Hunt to sell the vessels. Defendant's demurrer being sustained, plaintiff appeals.

MARSHALL, C. J., delivered the opinion of the court. The counsel for the appellant objects to the decree of the circuit court on two grounds. He contends, 1. That this power of attorney does, by its own operation, entitle the plaintiff, for the satisfaction of his debt, to the interest of Rousmanier in the Nereus and the Industry. 2. Or, if this be not so, that a court of chancery will, the conveyance being defective, lend its aid to carry the contract into execution, according to the intention of the parties.[88]

1. We will consider the effect of the power of attorney. This instrument contains no words of conveyance or of assignment, but is a simple power to sell and convey. As the power of one man to act for another depends on the will and license of that other, the power ceases when the will, or this permission, is withdrawn. The general rule, therefore, is, that a letter of attorney may, at any time, be revoked by the party who makes it; and is revoked by his death. But this general rule, which results from the nature of the act, has sustained some modification. Where a letter of attorney forms a part of a contract, and is a security for money, or for the performance of any act which is deemed valuable, it is generally made irrevocable, in terms, or if not so, is deemed irrevocable in law. 2 Esp. 565. Although a letter of attorney depends, from its nature, on the will of the person making it, and may, in general, be recalled at his will; yet, if he binds himself, for a consideration, in terms, or by the nature of his contract, not to change his will, the law will not permit him to change it. Rousmanier, therefore, could not, during his life, by any act of his own, have revoked this letter of attorney. But does it retain its efficacy after his death? We think it does not. We think it well settled, that a power of attorney, though irrevocable during the life of the party, becomes extinct by his death.

This principle is asserted in Littleton (section 66), by Lord Coke, in his commentary on that section (52b), and in Willes' Reports (105, note, and 565). The legal reason of the rule is a plain one. It seems founded on the presumption, that the substitute acts by virtue of the authority of his principal, existing at the time the act is performed; and on the manner in which he must execute his authority, as stated in Combes' Case, 9 Coke, 766. In that case, it was resolved, that

[88] The consideration of whether the court would give effect to the intention of the parties is omitted.

"when any has authority, as attorney, to do any act, he ought to do it in his name who gave the authority." The reason of this resolution is obvious. The title can, regularly, pass out of the person in whom it is vested, only by a conveyance in his own name; and this cannot be executed by another for him, when it could not, in law, be executed by himself. A conveyance in the name of a person, who was dead at the time, would be a manifest absurdity.

This general doctrine, that a power must be executed in the name of a person who gives it, a doctrine founded on the nature of the transaction, is most usually engrafted in the power itself. Its usual language is, that the substitute shall do that which he is empowered to do, in the name of his principal. He is put in the place and stead of his principal, and is to act in his name. This accustomed form is observed in the instrument under consideration. Hunt is constituted the attorney, and is authorized to make, and execute, a regular bill of sale, in the name of Rousmanier. Now, as an authority must be pursued, in order to make the act of the substitute the act of the principal, it is necessary, that this bill of sale should be in the name of Rousmanier; and it would be a gross absurdity, that a deed should purport to be executed by him, even by attorney, after his death; for, the attorney is in the place of the principal, capable of doing that alone which the principal might do.

This general rule, that a power ceases with the life of the person giving it, admits of one exception. If a power be coupled with an "interest," it survives the person giving it, and may be executed after his death. As this proposition is laid down too positively in the books to be controverted, it becomes necessary to inquire, what is meant by the expression, "a power coupled with an interest?" Is it an interest in the subject on which the power is to be exercised? or is it an interest in that which is produced by the exercise of the power? We hold it to be clear, that the interest which can protect a power, after the death of a person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing. The words themselves would seem to import this meaning. "A power coupled with an interest," is a power which accompanies, or is connected with, an interest. The power and the interest are united in the same person. But if we are to understand by the word "interest," an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise, is extinguished. The power ceases, when the interest commences, and therefore, cannot, in accurate law language, be said to be "coupled" with it.

But the substantial basis of the opinion of the court on this point, is found in the legal reason of the principle. The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name. The act of the substitute, there-

fore, which, in such a case, is the act of the principal, to be legally effectual, must be in his name, must be such an act as the principal himself would be capable of performing, and which would be valid, if performed by him. Such a power necessarily ceases with the life of the person making it. But if the interest, or estate, passes with the power, and vests in the person by whom the power is to be exercised, such person acts in his own name. The estate, being in him, passes from him, by a conveyance in his own name. He is no longer a substitute, acting in the place and name of another, but is a principal, acting in his own name, in pursuance of powers which limit his estate. The legal reason which limits a power to the life of the person giving it, exists no longer, and the rule ceases with the reason on which it is founded. The intention of the instrument may be effected without violating any legal principle.

This idea may be in some degree illustrated by examples of cases in which the law is clear, and which are incompatible with any other exposition of the term "power coupled with an interest." If the word "interest," thus used, indicated a title to the proceeds of the sale, and not a title to the thing to be sold, then a power to A., to sell for his own benefit, would be a power coupled with an interest; but a power to A., to sell for the benefit of B., would be a naked power, which could be executed only in the life of the person who gave it. Yet, for this distinction, no legal reason can be assigned. Nor is there any reason for it in justice; for, a power to A., to sell for the benefit of B., may be as much a part of the contract on which B. advances his money, as if the power had been made to himself. If this were the true exposition of the term, then a power to A., to sell for the use of B., inserted in a conveyance to A., of the thing to be sold, would not be a power coupled with an interest, and, consequently, could not be exercised, after the death of the person making it; while a power to A., to sell and pay a debt to himself, though not accompanied with any conveyance which might vest the title in him, would enable him to make the conveyance, and to pass a title not in him, even after the vivifying principle of the power had become extinct. But every day's experience teaches us, that the law is not as the first case put would suppose. We know, that a power to A., to sell for the benefit of B., engrafted on an estate conveyed to A., may be exercised at any time, and is not affected by the death of the person who created it. It is, then, a power coupled with an interest, although the person to whom it is given had no interest in its exercise. His power is coupled with an interest in the thing, which enables him to execute it in his own name, and is, therefore, not dependent on the life of the person who created it.

The general rule, that a power of attorney, though irrevocable by the party, during his life, is extinguished by his death, is not affected by the circumstance, that testamentary powers are executed after the death of the testator. The law, in allowing a testamentary disposition

of property, not only permits a will to be considered as a conveyance, but gives it an operation which is not allowed to deeds which have their effect during the life of the person who executes them. An estate given by will may take effect at a future time, or on a future contingency, and in the meantime, descends to the heir. The power is, necessarily, to be executed after the death of the person who makes it, and cannot exist during his life. It is the intention, that it shall be executed after his death. The conveyance made by the person to whom it is given, takes effect by virtue of the will, and the purchaser holds his title under it. Every case of a power given in a will, is considered in a court of chancery as a trust for the benefit of the person for whose use the power is made, and as a devise or bequest to that person.

It is, then, deemed perfectly clear, that the power given in this case, is a naked power, not coupled with an interest, which, though irrevocable by Rousmanier himself, expired on his death. * * *

Reversed and remanded for the second consideration.

DAVIS v. WINDSOR SAVINGS BANK.

(Supreme Court of Vermont, 1874. 46 Vt. 728.)

Assumpsit for money deposited in July, 1865, by the sister of plaintiffs' intestate, in defendant's bank in the name of the intestate. She drew out the money in December, 1865. Meantime, in October, 1865, her brother died in Panama. The court expressed the view that if the bank paid the money in good faith, and in ignorance of his death, it would not be affected by his death as a revocation of his sister's agency. Judgment was directed for defendant. Plaintiff excepted.

PIERPOINT, Ch. J. The only question presented by the bill of exceptions is, whether the defendant bank was justified in paying the money which it held to the credit of the deceased, to Mrs. Dudley, his sister, who deposited the money in the bank as his agent, such payment being made after the revocation of her agency by the death of her principal, said bank having no knowledge of such death, and paid the money in good faith. That the death of the principal terminates the agency, all the authorities agree; but the effect of such death upon the acts of those who in good faith deal with the agent without knowledge of the death, is a subject upon which there is some diversity of decision. But the weight of authority seems to be decidedly in favor of the principle, that the death of the principal instantly terminates the power of the agent, and that all dealings with the agent subsequent to that event, are void and of no effect, even though the parties were ignorant of that fact.[89]

[89] Accord: Vance v. Anderson, 39 Iowa, 426 (1874), citing many authorities and quoting from Harper v. Little, 2 Greenl. 14, 11 Am. Dec. 25 (1822), and Lewis v. Kerr, 17 Iowa, 73 (1864). The harshness and incongruity of

Kent lays down the rule, that "the authority of an agent determines by the death of his principal. By the civil law, the acts of an agent done bona fide after the death of the principal, and before notice of his death, are valid and binding on his representatives. But this equitable principle does not prevail in the English law, and the death of the principal is an instantaneous revocation of the authority of the agent, unless the power be coupled with an interest." 2 Kent Com. 646. Story lays down the same doctrine, and says: "As the act of the agent must, if done at all, be done in the name of the principal, it is impossible that it can properly be done, since a dead man can do no act, and we have already seen that every authority executed for another person, presupposes that the party could at the time, by his personal execution of it, have made the act valid;" and numerous authorities, both English and American, are referred to in support of the position. This principle was expressly held in Bank v. Estate of Leavenworth, 28 Vt. 209, and also in Mich. Ins. Co. v. Leavenworth, 30 Vt. 11. In the latter case, Judge Bennett, in delivering the opinion, says: "Though it may be true that when a power is revoked by the act of the party, notice may be necessary, yet when revoked by his death, the revocation at once takes effect; and if an act is subsequently done under the power, though without notice of the death of the party, the act is void." Many other cases might be referred to in support of the rule, but I do not deem it necessary.

A different doctrine was held in Cassiday v. McKenzie, 4 Watts & S. 282, 39 Am. Dec. 76; but as is said in a note in 2 Kent Com. 873, "It is substituting the rule of the civil for the rule of the common law." Indeed it is difficult to see how there can be an agent when there is no principal. The question whether in this case there was an interest coupled with the agency, and some other questions that were discussed in the argument, do not arise upon the exceptions as made up.

Judgment reversed, and cause remanded.

DEWEESE v. MUFF.

(Supreme Court of Nebraska, 1898. 57 Neb. 17, 77 N. W. 361, 42 L. R. A. 789, 73 Am. St. Rep. 488.)

NORVAL, J. On July 1, 1892, Catherine Muff executed a note, whereby she promised to pay to the order of James E. Jones the sum of $2,000 on September 1st of the same year, with interest thereon at 7 per cent. per annum. The payee resided in England, but the note

this rule is recognized in many cases. See Farmers' Loan & Trust Co. v. Wilson, 139 N. Y. 284, 34 N. E. 784, 36 Am. St. Rep. 696 (1893); Clayton v. Merrett, 52 Miss. 353 (1876). The death of the principal is a fact equally within the knowledge of all the parties, and all are equally charged in law with knowing it. Smout v. Ilbery, 10 M. & W. 1, 12 L. J. Ex. 357 (1842), post, p. 653.

was delivered to him personally at Crete, Neb., at which time he stated in substance, to Mrs. Muff, in the presence of one J. H. Gruben, her business manager, that he would probably sell the note to C. C. Burr, of Lincoln, as he (Jones) was going to England, and desired to take the money with him, and that the maker should pay the note to Mr. Burr. The latter had been, and then was, the agent of Mr. Jones. Instead of selling the note, the payee, soon after it was given, indorsed the same in blank, and delivered the instrument to Mr. Burr, for collection. Qn September 19, 1892, Mrs. Muff paid $1,000 on the note to Mr. Burr; and on November 11, 1892, she paid him the balance due; and the instrument was at the time delivered to her, indorsed, "Paid Nov. 11th, 92. C. C. Burr."

On October 16, 1892, James E. Jones died, leaving a will; and Jacob Bigler was duly appointed executor of his estate, and qualified as such. The executor repudiates the payment made to Mr. Burr on November 11th, claiming that the latter's authority to collect the note had been previously revoked by the death of Mr. Jones; and this action was brought to recover from Mrs. Muff the amount of said payment, as the balance alleged to be due on the note. The jury returned a verdict for the defendant, under a peremptory instruction of the court so to do; and error has been prosecuted from the judgment entered thereon. After the filing of the record in this court, Jacob Bigler died; and the action was revived in the name of Jasper C. Deweese, as executor de bonis non of the estate of James E. Jones, deceased.

It is disclosed that Mrs. Muff paid the amount due on the note to Mr. Burr in good faith, without any notice or knowledge whatsoever that he was not the owner of the paper, or that Mr. Jones, the payee, was dead. It is insisted that the court erred in directing a verdict for the defendant, because the death of Jones revoked the authority or power of Mr. Burr to receive from the maker payment of the obligation, although she was unaware of the death of the payee. Undoubtedly, the rule is that the death of a principal instantly terminates the agency. But it by no means follows that all dealings with the agent thereafter are absolutely void. Where, in good faith, one deals with an agent within his apparent authority, in ignorance of the death of the principal, the heirs and representatives of the latter may be bound, in case the act to be done is not required to be performed in the name of the principal. There is a sharp conflict in the authorities on the question, but it is believed that the better reasoned cases sustain the proposition stated, among which are the following: Ish v. Crane, 8 Ohio St. 520; Id., 13 Ohio St. 574; Cassiday v. McKenzie, 4 Watts & S. 282, 39 Am. Dec. 76;[40] Davis v. Lane, 10 N. H. 156; Dick v. Page,

[40] The leading cases for this view are Cassiday v. McKenzie, 4 Watts & S. 282, 39 Am. Dec. 76 (1842), and Ish v. Crane, 8 Ohio St. 520 (1858), Id., 13 Ohio St. 574 (1862), in the latter of which is an exhaustive review of the authorities. The court distinguishes between a deed, which must be made in the name of the principal, and acts in pais by the agent. He denies the

17 Mo. 234, 57 Am. Dec. 267; Moore v. Hall, 48 Mich. 143, 11 N. W. 844; 1 Am. & Eng. Enc. Law (2d Ed.) 1224.

We quote the following apposite language from the opinion in Ish v. Crane, 8 Ohio St. 520: "Now, upon what principle does the obligation, imposed by the acts of the agent after his authority has terminated, really rest? It seems to me the true answer is, public policy. The great and practical purposes and interests of trade and commerce, and the imperious necessity of confidence in the social and commercial relations of men, require that an agency, when constituted, should continue to be duly accredited. To secure this confidence, and consequent facility and aid to the purposes and interests of commerce, it is admitted that an agency, in cases of actual revocation, is still to be regarded as continuing, in such cases as the present, towards third persons, until actual or implied notice of the revocation. And I admit that I can perceive no reason why the rule should be held differently in cases of revocation by mere operation of law. It seems to me that in all such cases the party who has by his own conduct purposely invited confidence and credit to be reposed in another as his agent, and has thereby induced another to deal with him in good faith, as such agent, neither such party nor his representatives ought to be permitted, in law, to gainsay the commission of credit and confidence so given to him by the principal. And I think the authorities go to that extent. See Pickard v. Sears, 6 Adol. & E. 469.

"The extensive relations of commerce are ofter remote as well as intimate. The application of this doctrine must include factors, foreign as well as domestic, commission merchants, consignees, and supercargoes, and other agents remote from their principal, and who are required for long periods of time, not unfrequently, by their principal, to transact business of immense importance, without a possibility of knowing perhaps even the probable continuance of the life of the principal. It must not unfrequently happen that valuable cargoes are sold and purchased in foreign countries by the agent, in obedience to his instructions from his principal, after and without knowledge of his death. And so, too, cases are constantly occurring of money being collected and paid by agents, under instructions of the principal, after and without knowledge of his death. In all these cases, there is certainly every reason for holding valid and binding the acts so done by the agency which the principal had, in his life, constituted and ordered, that there would be to hold valid the acts of one who had ceased to be his agent, by revocation of his power, but without notice to the one trusting him as agent."

power of death to do for revocation what the principal could not do if he were alive, and insists on the equity of requiring the heirs and representatives to take the estate subject to the burdens caused by the acts of the principal, for which he would have to assume responsibility were he alive. The soundness of this reasoning is recognized in Lenz v. Brown, 41 Wis. 172 (1876), and in Murdock v. Leath, 10 Heisk. 166 (1872). But compare Rigs v. Cage, 2 Humph. 350, 37 Am. Dec. 559 (1841).

In the case at bar it was not necessary for the agent, Mr. Burr, to collect or receive the money in the name of Mr. Jones, nor did he do so. The defendant was justified in paying the money under the circumstances disclosed by the evidence. The note was properly indorsed by the payee in blank, and it was at the time in possession of Mr. Burr. Payment to him, without knowledge that the note was held for collection, or that the owner was dead, discharged the debt. Davis v. Association, 20 La. Ann. 24; 18 Am. & Eng. Enc. Law, 190; Edwards v. Parks, 60 N. C. 598; Loomis v. Downs, 26 Ill. App. 257; Stoddard v. Burton, 41 Iowa, 582; Boyd v. Corbitt, 37 Mich. 52; Moore v. Hall, 48 Mich. 143, 11 N. W. 844. In the case last cited, a negotiable note was indorsed by the payee, and delivered to an agent for collection. Subsequently the payee died. It was held that the authority to collect was not thereby revoked. A verdict for the defendant was properly directed in the case at bar.

The conclusion reached obviates an examination of the instructions tendered by the plaintiff, and refused by the court. The judgment is affirmed.

III. By Insanity, Bankruptcy, etc.

DAVIS v. LANE.

(Superior Court of Judicature of New Hampshire, 1839. 10 N. H. 156.)

See ante, p. 23, on which will be found the facts, and another portion of the opinion.

PARKER, C. J. * * * But it would be preposterous, where the power is in its nature revocable, to hold that the principal was, in contemplation of law, present, making a contract, or acknowledging a deed, when he was in fact lying insensible upon his death bed, and this fact well known to those who undertook to act with and for him. The act done by the agent, under a revocable power, implies the existence of volition on the part of the principal. He makes the contract—he does the act. It is done through the more active instrumentality of another, but the latter represents his person, and uses his name.

Farther—Upon the constitution of an agent or attorney to act for another, where the authority is not coupled with an interest, and not irrevocable, there exists, at all times, a right of supervision in the principal, and power to terminate the authority of the agent at the pleasure of the principal. The law secures to the principal the right of judging how long he will be represented by the agent, and suffer him to act in his name. So long as, having the power, he does not exercise the will to revoke, the authority continues.

When, then, an act of Providence deprives the principal of the power to exercise any judgment or will on the subject, the authority of the agent to act should thereby be suspended for the time being;

otherwise the right of the agent would be continued beyond the period when all evidence that the principal chose to continue the authority had ceased; for after the principal was deprived of the power to exercise any will upon the subject, there could be no assent, or acquiescence, or evidence of any kind to show that he consented that the agency should continue to exist. And, moreover, a confirmed insanity would render wholly irrevocable an authority, which, by the original nature of its constitution, it was to be in the power of the principal at any time to revoke.

It is for these reasons that we are of opinion that the insanity of the principal, or his incapacity to exercise any volition upon the subject, by reason of an entire loss of mental power, operates as a revocation, or suspension for the time being, of the authority of an agent acting under a revocable power. If, on the recovery of the principal, he manifests no will to terminate the authority, it may be considered as a mere suspension. And his assent to acts done during the suspension may be inferred from his forbearing to express dissent when they came to his knowledge. 1 Livermore on Agency, 300, Cairness v. Bleecker.

The act of the agent, in the execution of the power, however, may not in all cases be avoided on account of the incapacity. If the principal has enabled the agent to hold himself out as having authority, by a written letter of attorney, or by a previous employment, and the incapacity of the principal is not known to those who deal with the agent, within the scope of the authority he appears to possess, the transactions may be held valid, and binding upon the principal. Such case forms an exception to the rule, and the principal and those claiming under him may be precluded from setting up his insanity as a revocation, because he had given the agent power to hold himself out as having authority, and because the other party had acted upon the faith of it, and in ignorance of any termination of it. They would be so precluded in the case of an express revocation, which was unknown to the other party. 2 Livermore on Agency, 310; 5 D. & E. 215, Salte v. Field; Harper v. Little, 2 Greenl. 18, 11 Am. Dec. 25. And a revocation by operation of law, on account of the insanity of the principal, cannot have a greater effect than the express revocation of the party himself. But this case is not of that character. Here there was full knowledge of the situation of the plaintiff's intestate, by Prescott, when he received the note.

The principle that insanity operates as a revocation cannot apply where the power is coupled with an interest, so that it can be exercised in the name of the agent; for such case does not presuppose any volition of the principal at the time, or require any act to be done in his name, and is not revoked by his death.

Whether it is applicable to the case of a power which is part of a security, or executed for a valuable consideration, and thus is by its

terms or nature irrevocable; and which seems to be regarded in England as a power coupled with an interest (10 Barn. & Cres. 731; 4 Camp. 272), may be a question of more doubt ([Hunt v. Ennis] 2 Mason, 249 [Fed. Cas. No. 6,889]). Such a power could not be revoked by the principal, if his sanity was continued (2 Livermore, 308), and any volition of his could not alter the case. Some of the reasons, therefore, which have been adverted to, would not exist in a case of that character. But a power of that kind is to be executed in the name of the principal; and it was held, in Hunt v. Rousmanier's Adm'rs [8 Wheat. 174, 5 L. Ed. 589, ante, p. 275], before cited, that the death of the principal operates as a revocation of it, for the reason that after that event no act can be done in his name, as if he himself performed it. This reason would not exist where he was still living; and perhaps he and others might in such case be precluded from setting up his insanity in avoidance of the act, on the ground that he would have had no right to interfere, if sane, and had therefore no right to insist on his insanity as an objection.[41] * * *

The result of the view we have taken is, that the wife of the intestate had at the time no authority to dispose of this note to Prescott, and that he acquired no title to it, and had no right to receive the money. We have already held, on a former case, in this suit, that a payment to him by the defendant, under such circumstances, could not operate to discharge the note. Davis v. Lane, 8 N. H. 224. The instructions to the jury were erroneous; but there is no agreement in the case by which we are authorized to enter judgment for the plaintiff, and the action must, therefore, be transferred to the common pleas, for a new trial, if there is any thing further in controversy between the parties.

[41] *The bankruptcy* of a principal will not revoke a power coupled with an interest. Dickinson v. Central Nat. Bank, 129 Mass. 279, 37 Am. Rep. 351 (1880), though it will terminate an ordinary agency. Markwick v. Hardingham, 15 Ch. D. 339, 43 L. T. 647, 29 W. R. 361 (1880). The death of one partner, or joint owner, terminates an agency for such a principal. Long v. Thayer, 150 U. S. 520, 14 Sup. Ct. 189, 37 L. Ed. 1167 (1893). And so ordinarily does the dissolution of a partnership. Schlater v. Winpenny, 75 Pa. 321 (1874). But a mere change in a firm name, with no change in the individuals, or their interests, will have no effect. The confidence reposed remains as before. Billingsley v. Dawson, 27 Iowa, 210 (1869).

War interrupts communication so as to terminate an agency when the principal and agent reside on opposite sides of the hostile lines. Insurance Co. v. Davis, 95 U. S. 425, 24 L. Ed. 453 (1877). But see, contra, Sands v. N. Y. Life Ins. Co., 50 N. Y. 626, 10 Am. Rep. 535 (1872). This is not so, however, in cases where no intercommunication is necessary, and where no business intercourse is required, especially if the agent acts only for the purpose of preserving the property of the principal (Lyon v. Kent, 45 Ala. 656; Williams v. Paine, 169 U. S. 55, 18 Sup. Ct. 279, 42 L. Ed. 658 [1898]), even by investing it in the hostile country (Stoddart v. U. S., 6 Ct. Cl. 340 [1870]).

SECTION 3.—EFFECT OF TERMINATION

GUNTER v. STUART.

(Supreme Court of Alabama, 1888. 87 Ala. 196, 6 South. 266, 13 Am. St. Rep. 21.)

Action on account against Gunter and others, late partners, for goods furnished for their steamboats. The partnership was dissolved on October 5, 1885. The court below refused to charge that if McKee had ceased to be their agent, or if the partnership had been dissolved before McKee indorsed the accounts as correct, then defendants cannot be bound.

STONE, C. J. Part of Stuart's evidence, on which he relied for recovery against the steamboat company, the appellants, consisted in certain stated accounts, certified to be correct by one McKee, styling himself "clerk." These certificates, several of them, bear date in October, 1885, and some of the items appear to be later than this. There was testimony tending to show that McKee ceased to be clerk or agent of appellants about June 1, 1885, and that he was not afterwards in their employment.

It is too clear to admit of argument that after McKee ceased to be clerk and agent of appellants he could neither do any act, state an account, or make an admission, that would bind them. While the relation of principal and agent exists, the agent can bind his principal by any act done within the scope of his authority, and by any admission made contemporaneous with and explanatory of the act of agency so done (3 Brick. Dig. p. 25, §§ 107, 108); and it may be that, acting as clerk of the boat, it was within the purview of his duties to make purchases for the boat, and to state accounts. All these powers, however, would necessarily terminate when his connection with the boat was severed.[42] To obtain, after that time, any information he might possess, he must needs have been made a witness.

Charges 2 and 3 asked by appellants ought to have been given. Reversed and remanded.

[42] Though a discharged agent may perhaps to a limited extent, close up transactions entered into through him (Farmers' & Mechanics' Bank v. Stickney, Fed. Cas. No. 4,657, Brunner, Col. Cas. 543 [1845]), still this power is very narrow and unusual (Baudouine v. Grimes, 64 Iowa, 370, 20 N. W. 476 [1884]), and is usually confined to cases in which third persons have not had the notice of the revocation which the principal is bound to give (Easton's Adm'x v. Ellis, 1 Handy, 70 [1854]).

As between the agent and the principal, after an effectual termination of the agency the agent is deprived of all power to act, and therefore can acquire no rights against the principal by any subsequent attempt to exercise the powers of his agency. In re Overweg; Haas v. Durant, [1900] 1 Ch. 209, 81 L. T. 776, 69 L. J. Ch. 255; Soule v. Dougherty, 24 Vt. 92 (1852). By such acts he only subjects himself to liability. McEwen v. Kerfoot, 37 Ill. 530 (1865).

PART II

THE AUTHORITY

CHAPTER I

NATURE AND EXTENT

SECTION 1.—IN GENERAL

BURCHARD v. HULL.

(Supreme Court of Minnesota, 1898. 71 Minn. 430, 74 N. W. 163.)

Plaintiff was a customer of the Vermont National Bank of Brattleboro, and requested the bank to loan $1,200 for her on Western real estate security. The bank made the loan, through A. F. & L. E. Kelley, of Minneapolis, to defendant Hull, who executed a mortgage on the land in question to secure the payment of the note which he executed, payable in five years, according to ten coupon notes of even date, attached to the principal note and payable, one on January 1st. and one on July 1st, of each year. After recording the mortgage, the Kelleys transmitted it, with the note and coupons, to the bank, which delivered them to plaintiff, who has ever since retained them, except as she has detached and delivered to the bank for collection the coupons as they matured. She did not know of the Kelleys, except as she saw their names printed on the margins of the notes. The custom of the bank was to send these coupons to the Kelleys, who would collect and remit the proceeds to the bank, which then placed the amounts to the credit of plaintiff's account.

Hull defaulted in payments due July 1, 1892, and January 1, 1893, but the Kelleys did not report this, and advanced the amounts out of their own funds. They placed these coupons in the hands of an attorney to foreclose the mortgage, and A. F. Kelley bid it in at $1,400. There was no redemption, and in November, 1894, A. F. Kelley conveyed the land to the defendant Wells for $1,750, and appropriated the money to his own use. Wells seems to have bought in good faith, and neither plaintiff nor the bank knew of the pretended foreclosure until the Kelleys failed in 1896, for the Kelleys had kept up

the coupon payments. Plaintiff, upon ascertaining the facts, promptly repudiated the attempted foreclosure and commenced this action. From orders denying her motions to amend pleadings and for a new trial, she appeals.

MITCHELL, J.[1] * * * There is a mass of evidence tending to show that it was the custom of the Kelleys to advance money to pay interest on loans placed by them for others, and then foreclose the mortgages, bid the land in, in their own names, and sell it if not redeemed. But there is not a particle of evidence that plaintiff had any knowledge of such a custom, and, there being nothing in the facts making it her duty to know it, we dismiss the evidence as to the Kelleys' custom with the simple statement that it is wholly irrelevant and immaterial.

We have not overlooked the fact that the Vermont bank had, through the Kelleys, made one or two other loans for the plaintiff under similar authority, the securities for which were delivered and retained by her, and the principal and interest as they matured collected through the bank. But there is nothing in these transactions which at all affects the present one, or at all tends to enlarge or change the authority, either express or implied, of the bank or the Kelleys in the matter now under consideration. The case is entirely free from any element of estoppel by conduct, or of apparent, as distinguished from actual, authority, or of ratification.

The defendant Wells must stand exclusively upon the proposition that the act of the plaintiff in delivering or transmitting these interest coupons (she herself retaining the mortgage and principal note) to another, with authority to collect the same, gave such other person implied authority to foreclose the mortgage if the coupons were not paid. The learned trial judge saw clearly that this was so, and hence, in his memorandum, placed his decision squarely on the ground that, in placing the coupons in the hands of the bank for collection, she authorized it and such subagents as it might employ to use the usual and customary methods of enforcing payment; and, as the coupons were secured by a mortgage containing a power of sale, the foreclosure of the mortgage under the power is the usual and customary method of enforcing payment.

It is axiomatic in the law of agency that no one can become the agent of another except by the will of the principal, either express or implied from the particular circumstances; that an agent cannot create in himself an authority to do a particular act merely by its performance. It is equally axiomatic that the extent of the authority of an agent also depends upon the will of the principal, and that the latter will be bound by the acts of the former only to the extent of the authority, actual or apparent, which he has conferred upon the agent.

[1] Part of the opinion is omitted.

Forms of employment

It is, of course, a fundamental principle in the law of agency, that every delegation of power carries with it, by implication, the authority to do all those things which are reasonably necessary and proper to carry into effect the main power conferred, and which are not forbidden. But the doctrine of implied authority goes no further than this. It is also true that where the principal confers upon his agent an authority of a kind, or empowers him to transact business of a nature, in reference to which there is a well-defined and publicly known usage, it is the presumption of the law, in the absence of anything to indicate a contrary intent, that the authority was conferred in contemplation of the usage; and therefore third persons who deal with the agent in good faith have a right to presume that the agent has been clothed with all the powers with which, according to such usage in that particular business, similar agents are clothed. But, in order to give the usage this effect, it must be known to the principal, or have existed for such a length of time, and become so widely known, as to warrant the presumption that the principal had it in view at the time he appointed the agent.

On the facts of this case, the doctrine of implied power cannot be successfully invoked under either of these principles.[2] If an agent

[2] In another case in which one Aldrich, who at the request of the Central Trust Company had negotiated a loan from Daniel Steele to Snyder, had afterwards received money to apply upon the note, the question of his authority to receive such payments so as to charge Steele as his principal became the pivotal question. Lester v. Snyder, 12 Colo. App. 351, 55 Pac. 613 (1898): "Upon the trial the court called a jury for advisory purposes, and submitted to it this question of agency, and it was found in favor of plaintiff's contention. There was no evidence adduced showing or tending to show that Aldrich or the securities company was appointed by Steele as his agent, or authorized by him to collect or receive any payments of this loan. The questions, then, to be determined are whether or not the acts of Steele in connection with those of the securities company and Aldrich were such as to create an implied agency, and to estop Steele from pleading that he was not. Under the circumstances of this case, we think that the court erred in submitting the question of agency to a jury. The facts which it is claimed created the agency in this case were undisputed, and it therefore became a question of law solely for the court to determine upon the conceded facts. There was no dispute nor conflict of evidence for the jury to weigh and determine. Mechem, Ag. § 105. As the jury in this case was called for advisory purposes only, however, and its verdict could be disregarded by the court if it so desired, this of itself would not be sufficient to justify the reversal of the judgment. If the facts were sufficient in law to create an agency, the judgment must be sustained, notwithstanding the question should not have been submitted to the jury. In the determination of the question as to whether or not an agency existed in the circumstances of this case there are certain fundamental and well-established principles bearing upon the doctrine of agency which must be borne in mind. They are thus tersely and aptly stated by Mr. Mechem: 'Among these are, as has been seen, that the law indulges in no bare presumptions that an agency exists,—it must be proved or presumed from facts; that the agent cannot establish his own authority, either by his representations or by assuming to exercise it; that the authority cannot be established by mere rumor or general reputation; that even a general authority is not an unlimited one, and that every authority must find its ultimate source in some act of the principal. Persons dealing with an assumed agent, therefore, whether the assumed agency be a general or a special one, are bound at their peril to ascertain, not only the fact of the agency, but the extent of the authority;

to whom an interest coupon is sent for collection (while his principal retains in his own possession the collateral mortgage and principal note not yet due) has implied power to foreclose the mortgage, the sooner men know it the better. We apprehend the announcement of any such doctrine would take both the legal profession and business men by surprise. It may be that the power to collect would carry with it power to sue on the coupon. But the foreclosure of the security which the principal may have is an entirely different matter. The mortgage and the evidence of the debt are separate instruments, and afford independent remedies. The creditor may commence a personal action on the note or other evidence of the debt, or he may proceed to realize on his security; and the pursuit of one remedy is no bar to the other. The right to foreclose is not waived or impaired by the recovery of judgment upon the debt. A creditor might desire to sue on the debt, but not to foreclose his security, and vice versa. He might be willing to intrust an agent with the collection of an interest coupon, but unwilling to intrust him with the foreclosure of a collateral mortgage, which might result in sacrificing his security for the whole debt. As suggested in appellant's brief, suppose the plaintiff, instead of a mortgage on real estate, had held, as security, elevator receipts for grain, and had transmitted these interest coupons to an agent for collection, she retaining the receipts for the grain; would it be claimed that the agent would have implied authority to sell the grain? The fact that in this case the mortgage was on real property, and on record, does not alter the principle.

and, in case either is controverted, the burden of proof is upon them to establish it.' Applying these principles, it is clear that, in whatever light the acts of the parties may be viewed, there was an entire failure to establish any authority or agency, either express or implied, on the part of Aldrich or the securities company, to receive payment of the principal, or any part of it, of the Snyder loan. Mr. Steele was at all times in possession of all of the securities representing the loan, and at no time does it appear from the evidence that he ever intrusted them, or any of them, to Aldrich or the securities company, or even to the Central Trust Company. We may concede—although even that is not established by the evidence—that Aldrich was the agent of Steele to collect the interest, but that would not authorize him to collect the principal, and payment to him of such principal would not discharge the liability of the maker to the payee. Mechem, Ag. § 379; Smith v. Kidd, 68 N. Y. 130, 23 Am. Rep. 157. We might even go further, and admit it to have been shown by the evidence—which it was not—that Aldrich was, under the circumstances of the case, the general agent of Steele, authorized to receive the payment of the principal when due; but even then he would have no authority to receive payment before maturity, so as to bind the payee. It will be remembered that the principal of this note under the extension agreement did not mature until August 1, 1897, and the pretended payments to Aldrich were received by him about the beginning of the year 1896, more than 18 months prior to maturity, and while he was not in possession of a single security, either the deed of trust, the note, the extension agreement, or the interest coupon notes. The party who makes payment under such circumstances as these must do so at his peril."

In Hill v. Helton, 80 Ala. 528, 1 South. 340 (1886), the court held that, while the authority as agent may be proved by circumstances, those circumstances must in some way, directly or indirectly, be connected with the principal.

Whether, had the principal note been due, and been transmitted for collection, the agent would have had implied authority to foreclose, is a question not before us, and which need not now be considered. But very clearly, where an interest coupon on a principal note not yet due is sent to an agent for collection (that being the extent of his express authority), the principal retaining the principal note and collateral mortgage, the implied authority of the agent is limited to a resort to such remedies as may be pursued on the coupon, irrespective of the collateral mortgage. It may be, as suggested by the trial court, that foreclosure is the usual way of collecting debts secured by mortgage. If so, it must be because the personal pecuniary irresponsibility of the mortgagors renders it the only effective method. But that is a very different thing from holding that an agent employed merely to collect a coupon for interest on a principal note not yet due has implied authority to foreclose a mortgage which his principal holds as security for the entire debt. There is no proof of any such usage in that business, unless the practice of the Kelleys proves it. But, fortunately, the business methods of the Kelleys are not sufficient to establish a general custom or usage with reference to which other people are presumed to contract.

It is suggested that, under the registry laws, Wells is protected as a bona fide purchaser, for value, because Kelley's title appeared perfect of record. This claim might be urged with equal force if one of the deeds in the chain of title had been forged. This case illustrates the fact that our system of registration will not always protect those who purchase in reliance upon the public records. This may be partly owing to defects in the system, and in part owing to causes that are remediless under any system. The defect which was the principal cause of trouble in this case was remedied, in part at least, by Gen. Laws 1897, c. 262, which requires the authority of an attorney to foreclose a mortgage under a power to be in writing and recorded. The suggestion that the Kelleys had authority to foreclose, because the mortgage provided that it might be foreclosed by the mortgagee, her "attorney or agent," is not entitled to extended notice. If the person assuming to foreclose had no authority to do so, he was not the agent of the mortgagee for any such purpose. The defendant Wells is unfortunately the victim of the fraud and dishonesty of the Kelleys, but this is no reason why the plaintiff should be deprived of her mortgage. Order reversed.

CUMMINS v. BEAUMONT.

(Supreme Court of Alabama, 1880. 68 Ala. 204.)

SOMERVILLE, J. This is an action of detinue, brought for the recovery of a piano, which was hired by the appellant, Cummins, to one Mrs. Phillips, and by her sold to the appellee, Beaumont. The contract was in writing, and from its terms was a mere bailment, and not a conditional sale. The intention of the parties, as expressed in this letting for hire, is evidently to repudiate expressly the idea of a sale. Mrs. Phillips was, at the same time, constituted by Cummins as his agent to sell pianos and organs; and the authority was also in writing. She was to receive commissions on all sales of them, and "to make all orders for the same to said Cummins"; and it was further provided, that "the instruments [were] to be sent direct from the factory." The appellee, Beaumont, purchased the piano in question from Mrs. Phillips, paying her three hundred dollars cash for it, and without any notice of the limited agency, or her want of authority to sell; and she failed to pay over the money to the appellant. She had made no other sales to any one, except of one organ; and this sale was known to Beaumont, when he purchased.

We think the principle must control here, that one who deals with an agent, is bound always, at his peril, to ascertain the extent of his authority. Powell's Adm'r v. Henry, 27 Ala. 612; 1 Brick. Dig. p. 55, § 35. The appellee, when he made the purchase in question, was required to know the status of the personal property sued for in this action, and the written limitations upon the agent's authority to deal with it. Its sale by Mrs. Phillips was an unauthorized conversion, and conferred no title on the purchaser. The contract of letting for hire expressly took it out of the operation of the other agreement authorizing sales of pianos and organs on certain stipulated conditions. The exercise of proper diligence, by inquiry, might have led to this knowledge. Furthermore, it was clearly contemplated, by the contract of agency, that the agent was "to make all orders" to the principal for such instruments as might be sold, and that they were to be shipped "direct from the factory" by the principal. A knowledge of the agency was, in law, a knowledge of the contents of this writing; for "the vital principle of the law of agency lies in the legal identity of the agent and the principal, created by their mutual consent;" and a principal is not bound by the acts of his agent, who transcends the scope of his authority. 1 Greenl. Ev. § 59.[3] And such powers of attorney are

[3] In Hambro v. Burnand [1903], 2 K. B. 399, 8 Com. Cas. 252, 72 L. J. K. B. 626, 19 T. L. R. 584, 51 Wkly. Rep. 652, reversed on other grounds in [1904] 2 K. B. 10, 9 Com. Cas. 251, 73 L. J. K. B. 669, 90 L. T. Rep. (N. S.) 803, 20 T. L. R. 398, 52 Wkly. Rep. 583, one B., an underwriter, was the agent of other underwriters to underwrite policies in their names and on their behalf. Purporting to act as such agent, he underwrote a policy, guaranteeing payment to plaintiffs by a certain company of certain advances made by plain-

ordinarily subjected to a strict construction, so as to preclude all authority not expressly given, or necessarily to be inferred. Dearing v. Lightfoot, 16 Ala. 28; Scarborough v. Reynolds, 12 Ala. 252; Fisher v. Campbell, 9 Port. 210.

The circuit court erred in the charge given; and the judgment is reversed, and the cause remanded.

tiff. B. knew the company was insecure, but was personally interested in keeping it afloat. The company failed to repay. Bingham, J., in passing upon the authority conferred by the documents of appointment of the agent, says: "The mandate authorizes the making of contracts for and on behalf of the principals. It does not authorize the making of contracts for and on behalf of the agent. No doubt there are many cases in which a general agent to make contracts of a certain kind has been held to bind his principal by a contract of that kind, though made for his own purposes. But all such cases proceed upon the doctrine of estoppel by holding out. They are cases in which the other contracting party has been induced to enter into the contract by a representation made to him by the principal that the agent's acts were authorized. I can find no case where the extent of the authority of a general agent not held out as such has been measured by anything outside or beyond the actual terms in which the agency is created. Sometimes, in order to ascertain whether the principal is liable, the question is asked whether what the agent has done is within 'the scope' of his employment. It is in my opinion a loose and unsatisfactory test of the liability; but, applying it in this case, I am satisfied that what Burnard did was not within the scope of his employment. It was to his own knowledge wholly without its scope. Nor is the case one of negligent or of tortious conduct in carrying out the agency intrusted to him. If it were, some liability might fall on the defendants. The making of the contract sued on was a wilful act not done in carrying out the agency at all, but done wholly outside it. In my view Burnand had no more right to sign this policy on the defendants' behalf than he had to forge their signatures to it. Again, it is sometimes said that where one of two innocent parties must suffer from the fraud of a third person, he who has enabled the third party to commit the wrong ought to bear the loss. I do not think this test is applicable to the present case, where the only question is one of authority. But even if it were applicable, it would, in my opinion, be wrong to say that the defendants had in fact enabled Burnand to commit the fraud. All they had done was to authorize him to underwrite risks for them; and the giving of such authority afforded him no additional facility for committing frauds. Then, again, it is said that even if the plaintiffs had asked to see the authorities, and had read them, they had no means of ascertaining whether the policies were issued for the benefit of the principals or not. That may be true. But my answer is, that a man is not to be held liable because it has been difficult or even impossible to ascertain whether he was liable or not. If a person contracts with an agent, it is for him to see as best he can that the agent is acting within his authority. If the authority exists by reason of a holding out, then the person making the contract must take care that the agent does nothing which the holding out does not warrant; if the authority does not arise from a holding out, then care must be taken to see that what is being done is within the terms of the actual authority. It is often difficult, or inconvenient, or impolitic to make inquiries about an agent's authority, but that circumstance does not make the principal liable where he is otherwise not liable. The other contracting party takes the risk, and, though now and then it turns out that the risk is serious and real, the event is not of sufficient frequency to interfere with business. The view, then, that I take of this case is that the plaintiffs are not entitled to rely on any authority except such as is to be found in the documents; that the authority to be there found is limited to the making of policies 'for' the defendants; that the policy sued on was not made 'for' the defendants, and that therefore they are not bound by it. In shorter words, I think it is the plaintiffs whom Burnard cheated and not the defendants, and that the loss must lie where it has fallen. The law is, I think, accurately stated in Story on Agency, § 133, at page 149 of the 9th edition: 'Where the agency is not

MUSSEY v. BEECHER.

(Supreme Judicial Court of Massachusetts, 1849. 3 Cush. 511.)

SHAW, C. J. This is an action of assumpsit for goods sold and delivered, which are alleged to have been purchased of the plaintiff by the defendant, through the agency of William Pierce, acting under a power of attorney from the defendant. The question is upon the legal construction of the defendant's power of attorney to Pierce, which is in writing, and is stated at large in the report. To this power was annexed the following proviso: "Provided, however, that said Pierce shall not make purchases or incur debts exceeding in amount at any one time the sum of two thousand dollars, and also that this power or agency shall not extend for a period of time beyond January 1st, 1842." The power was afterwards extended by a memorandum to the 1st of January, 1843.

The presumption is, that the plaintiff knew of the terms of this power and of its limitation, before he sold goods to Pierce, on the strength of it, and on the credit of the defendant; and, indeed, the evidence was, that he had seen the instrument. Various questions of fact were submitted to the jury on the evidence, as to the extension of the power, or

held out by the principal, by any acts, or declarations, or implications, to be general in regard to the particular act or business, it must from necessity be construed according to its real nature and extent; and the other party must act at his own peril, and is bound to inquire into the nature and extent of the authority actually conferred. In such a case there is no ground to contend that the principal ought to be bound by the acts of the agent, beyond what he has apparently authorized; because he has not misled the confidence of the other party who has dealt with the agent. Each party is equally innocent; and in a just sense it cannot be said that the principal has enabled the agent to practise any deception upon the other party. The duty of inquiring then is incumbent upon such party, since the principal has never held the agent out as having any general authority whatsoever in the premises. And if he trusts without inquiry, he trusts to the good faith of the agent and not to that of the principal.'"

See, also, Deffenbaugh v. Jackson Paper Mfg. Co., 120 Mich. 242, 79 N. W. 197 (1899).

In a recent case, the trial court, having instructed the jury that the burden was upon the plaintiff to prove that his agent had no actual authority to do the thing complained of, it was held to be error. The court said: "The court stated to the jury that the burden was upon plaintiff to prove by a fair preponderance of the evidence that Sturm had no actual authority to do the thing complained of. We are of opinion that the court erred in this instruction. It is elementary that the power of an agent to bind his principal rests entirely upon the authority conferred upon him. Without such authority, for which the principal himself becomes, by act or conduct, responsible, the agent can bind himself only. 'Every person, therefore, who undertakes to deal with an alleged agent, is put upon inquiry, and must discover at his peril that such pretended agent has authority, that it is in its nature and extent sufficient to permit him to do the proposed act, and that its source can be traced to the will of the alleged principal.' 31 Cyc. 1322; Ermentrout v. Insurance Co., 63 Minn. 305, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St. Rep. 481." Dispatch Ptg. Co. v. Nat. Bank of Commerce, 109 Minn. 440, 124 N. W. 236 (1910).

See, also, Rosendorf v. Poling, 48 W. Va. 621, 37 S. E. 555 (1900); Shull v. New Birdsall Co., 15 S. D. 87, 86 N. W. 654 (1901).

a waiver of the limitation, and the like; but the real question arises upon the correctness of the instructions, in matter of law.

The court instructed the jury, that the plaintiff must show, that such goods were sold under the power to Pierce, as his agent, and not upon the personal credit of Pierce; and that, although the power was limited, and such limitation was known to the plaintiff, yet that the defendant would be liable for Pierce's purchases, even though he had already exceeded the amount authorized by the power; if they were satisfied, from the evidence, that, at the time of the purchases, Pierce represented, that by such purchases he would not exceed his limit.

In another connection, the same instruction, in effect, was given, with a slight variance of form, as follows: "That if the plaintiff had inquired of Pierce about the agency, and had been informed by him that it was not full, and he had no reason to suspect the truth of Pierce's declaration, and if the plaintiff then sold goods to Pierce, as agent, as aforesaid, the defendant would be liable for such goods, even though the agency was then full."

The former part of this instruction, that it must appear, that the goods were not sold on the personal credit of Pierce, is unquestionably correct; but, in regard to the latter part, which makes the defendant responsible for the veracity and accuracy of Pierce, a majority of the court are of opinion, that it was not correct in point of law.

This power of attorney, which is in the nature of a letter of credit, is precise and limited in amount; and, though it contains some expressions, intimating that the attorney is the general agent of the constituent, to purchase and sell goods, yet this is controlled by the proviso and express condition; and, taken all together, as every written instrument must be, it is an authority to purchase in the name and on the credit of the author of the power, to the amount of $2,000, and no more.

The precise point is this, whether, if Pierce, through design or mistake, represented to the plaintiff, that when he made the purchase in question, he had not purchased on the credit of his principal to the amount of $2,000, when, in truth, his purchases exceeded that sum, the defendant was bound by it. It is unquestionably true, that the statements and representations of an agent, in transacting the business of his principal, within the scope of his authority, are as binding on his principal, as any other acts done within the scope of his authority; they are res gestæ, and are acts. But an agent cannot enlarge his authority any more by his declarations, than by his other acts; and the rule is clear, that the acts of an agent, not within the scope of his authority, do not bind the principal. It is often said, indeed, that one is bound by the acts of a general agent, though done against his instructions. This is because the acts are within the scope of his authority; and the violation of his instructions, in the execution of such authority, is a matter solely between himself and his principal, which cannot affect a stranger dealing with him without express notice.

The argument is, that the defendant ought to be bound, because Pierce was his agent, and he, by his letter of attorney, had put it in his power to make such purchase. This, it appears to us, assumes the very point to be proved. The plaintiff knew that he was limited to $2,000; he knew, therefore, that if he had purchased to that amount, his power, by its own limitation, was at an end. If it were otherwise, a power to purchase to the amount of $2,000, would operate as a power to purchase to an unlimited amount. But it is urged, that, upon this construction, no one could safely deal with the agent. This objection, we think is answered by the consideration, that no one is bound to deal with the agent; whoever does so is admonished of the extent and limitation of the agent's authority, and must, at his own peril, ascertain the fact, upon which alone the authority to bind the constituent depends. Under an authority so peculiar and limited, it is not to be presumed that one would deal with the agent, who had not full confidence in his honesty and veracity, and in the accuracy of his books and accounts. To this extent, the seller of the goods trusts the agent, and if he is deceived by him, he has no right to complain of the principal. It is he himself, and not the principal, who trusts the agent beyond the expressed limits of the power; and, therefore, the maxim, that where one of two innocent persons must suffer, he who reposed confidence in the wrong-doer must bear the loss, operates in favor of the constituent, and not in favor of the seller of the goods. Parsons v. Armor, 3 Pet. 413, 7 L. Ed. 724; Stainer v. Tysen, 3 Hill, 279; Attwood v. Munnings, 7 Barn. & Cr. 278. The case of Putnam v. Sullivan, 4 Mass. 45, 3 Am. Dec. 206, was decided on the ground, that the defendants, by leaving blank indorsements with their clerk, had authorized him by his act to bind them as indorsers.

On the whole, a majority of the court are of opinion, that the verdict must be set aside, and a new trial granted.[4]

GRAND RAPIDS ELECTRIC CO. v. WALSH MFG. CO.

(Supreme Court of Michigan, 1905. 142 Mich. 4, 105 N. W. 1.)

Assumpsit for goods sold and delivered. Defendant's superintendent, Edsall, ordered of plaintiff a dynamo for the mill of which he was superintendent. There was a dynamo in the mill, and the defendant denied his authority to buy one, or to do anything but operate the mill, hire and discharge the men. Plaintiff knew nothing further of the authority except the agent's own representations, his business card, and the letter heads, furnished by defendant company for Edsall's correspondence, on which appeared "J. C. Edsall, Supt." Judgment for plaintiff and defendant brings error. Affirmed.

[4] The opinion of Wilde, J., dissenting, is omitted.

BLAIR, J.[5] * * * Defendant's counsel contend that a party dealing with an agent is bound to inquire into the extent of his authority, ignorance of which is no excuse. This is undoubtedly a correct statement of a general principle of the law of agency, but this rule is not to be applied without qualifications and under all circumstances. It is equally well settled that, having ascertained the general character or scope of the agency, the party is authorized to rely upon the agent's having such powers as naturally and properly belong to such character, and, in the absence of circumstances putting him upon inquiry, is not bound to inquire for secret qualifications or limitations of the apparent powers of the agent. Inglish v. Ayer, 79 Mich. 516, 44 N. W. 942; Allis v. Voigt, 90 Mich. 125, 51 N. W. 190; Austrian & Co. v. Springer, 94 Mich. 343, 54 N. W. 50, 34 Am. St. Rep. 350.

The legitimate powers of a general agent, in the absence of known limitations, must depend largely upon the circumstances of each particular case, and usually present questions of fact for the determination of a jury. The apparent right of the superintendent and general manager of a small business to make a purchase of machinery costing over $600 might be quite different from the right of the superintendent of a large business to make the same expenditure. The defendant company was a foreign corporation, carrying on, through Edsall, as its local representative, extensive business enterprises at Frederic, consisting of a large heading mill and auxiliary lumber camps, an opera house, and a general store, employing many men, of all of which, as we understand the record, Edsall was the superintendent and general manager. We do not think it can be said, as a matter of law, that the purchase of the dynamo which was necessary for the lighting of the plant was so clearly outside of the apparent powers with which defendant had clothed Edsall as to justify the court in directing a verdict for defendant. We therefore think that the court committed no error in submitting the question to the jury. * * *

MOORES v. CITIZENS' NAT. BANK.

(Circuit Court of the United States, S. D. Ohio, W. D., 1883. 15 Fed. 141.)

Robt. B. Moores was cashier of defendant bank. Plaintiff loaned him $9,100, for which he assigned to her 91 shares of stock in defendant bank, which he claimed to own. As a matter of fact, he had previously transferred to other parties all his shares, but neither plaintiff nor defendant knew of the cashier's fraud for some years. He is now insolvent, and defendant bank declines to recognize plaintiff as a stockholder, and denies to her all rights pertaining to that relation.

[5] Part of the opinion is omitted.

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There is another principle of law applicable to this case. An agent cannot lawfully act in the same matter for his principal and for himself, in cases wherein their interests are adverse to each other.[7] To illustrate: If a cashier were to draw a check *in his own favor,* and then, as cashier, certify for the bank that the check was good, and he had funds in the bank to meet it, the bank would be bound to pay it upon proper indorsement and presentation. But if, in point of fact, he had no funds in the bank to check upon, the bank could not be held liable upon his certificate, although made in his capacity of cashier of the bank, notwithstanding the party suing the bank may have in good faith, bought the check in the belief, predicated on the cashier's certificate, that the check was drawn against a fund in the hands of the bank, and that it was good and would be paid on proper presentation. Yet, if such check was drawn in favor of a stranger, and certified by the cashier to be good, his bank would be legally bound and liable thereon. The reason why the bank is not liable for a check drawn by a cashier in his own favor and certified to be good, even in the hands of one buying it in good faith and in ignorance of any fraud, has been stated. An agent cannot act for his principal and himself in matters in which they have adverse interests, and every one purchasing such a check is, upon its face, admonished by the law of the necessity of making inquiry into the fairness and good faith of the transaction, and if he does not do this, however honestly he may rely on the integrity of the agent, the loss must be sustained by him.

Now, is this principle applicable to the facts of this case? Keep in mind that the plaintiff was dealing with Moores, the cashier, in his individual capacity. She agreed to loan her money to him on condition that he would have a certificate issued to her for 91 shares of the defendant's capital stock. Hé undertook to do this. The undertaking was for his own benefit, in order to enable him to consummate the loan. He had possession of the bank's book of certificates. One of the certificates contained therein was signed by the president in blank, and left with him for use when occasion required it. He took this, and without authority, without consideration, and without the knowledge of any other officer of the bank, filled it up in the plaintiff's name and delivered it to her, with the contract of the fifteenth of July, 1867, as a security for the repayment of the money loaned. This certificate, made by Moores for his own benefit, is filled

[7] See, also, Jacoby v. Payson, 85 Hun, 367, 32 N. Y. Supp. 1032 (1895), in which the agent applied the proceeds of a check to the payment of his individual debts, and N. Y. Iron Mine v. First Nat. Bank, 39 Mich. 644 (1878), in which it was held by Cooley, J., that the fact that an agent of large powers drew negotiable paper in his own favor should have put the bank upon inquiry as to his authority to do so. When a party dealing with an agent has knowledge of such facts as will put him on inquiry as to the extent of the agent's authority, the principal will not be bound by acts not contained in the authority conferred. Taylor Mfg. Co. v. Brown, 4 Willson, Civ. Cas. Ct. App. § 3, p. 19, 14 S. W. 1071 (1889).

up in his handwriting and signed by him as cashier. Now, while the plaintiff relied upon his honesty, and believed that the certificate had been issued in good faith and by competent authority, she knew that in issuing it Moores was acting for himself; that the certificate was issued by him for his own benefit, to be used for the purpose and in the manner stated. This knowledge, we think, was enough to put her on inquiry. If she had made the inquiry, which the law as well as prudential reasons required, under the circumstances of this case, Moores' fraudulent action would have been developed, and the loss resulting therefrom avoided.

Agents intrusted with important interests and invested with large powers have many opportunities for an abuse of their trusts. Nevertheless, if their fraudulent acts are within the scope of their agencies, and a loss must result either to their principals or to an innocent person, who relied upon their action in the belief that the same was valid, the law would cast the loss upon the principal who selected and placed the agent in the position to do the wrong, and not on the innocent party. But if the complaining party knows, when accepting a check, certificate of stock, receipt, or other acquittance or obligation, issued or executed by the agent in the name of the principal, that he was acting in regard thereto for himself and in his own interest, such knowledge would put such party on inquiry, and divest him or her of the legal rights and incidents pertaining to that class of persons.

The plaintiff having had knowledge of the fact that Moores, upon whom she relied to have the stock transferred to her, was acting for himself as well as in his capacity of cashier—that is, acting for the bank upon one side and for himself on the other, in reference to the matter of issuing this certificate—she is not, in the judgment of this court, an innocent holder of the stock; and as the certificate was issued without authority and in fraud of the rights of the bank, the court instructs you that the plaintiff is not entitled to recover in this action. Your verdict will therefore be for the defendant.

SECTION 2.—AUTHORITY AND INSTRUCTIONS

I. In General

GRIGGS v. SELDEN.[8]

(Supreme Court of Vermont, 1886. 58 Vt. 561, 5 Atl. 504.)

Assumpsit for leather ordered by one Gibson, who was the agent of defendant to manage her custom business in boots and shoes. He had no express authority to buy, but had on one occasion been permitted by letter of defendant to buy a bill of plaintiff, and the latter supposed he had authority in the present case. The matter was submitted to a referee.

ROWELL, J. The referee has found a fact, if it is a question of fact, as it certainly is (Sessions v. Newport, 23 Vt. 9), that the plaintiff was justified in his belief that Gibson, in carrying on the business, and making purchases and sales, "had the usual authority of an agent who had the sole management of the business." He further finds that the defendant "held out" Gibson as her agent, which was known to the plaintiff, and acted upon by him in good faith. This finding makes the defendant liable, on the ground that if one holds another out to the world, and accredits him as his agent, he is bound by that person's acts done within the scope of the agency thus given to him. In such cases the question is not what authority was intended to be given to the agent, but what authority was the third person dealing with him justified, from the acts of the principal, in believing was given to him. 1 Amer. Lead. Cas. 568; Story, Ag. & 127, note 2.[9]

Judgment affirmed.

[8] Approved in Aldrich v. Wilmarth, 3 S. D. 523, 54 N. W. 811 (1893). See, also, Welch v. Clifton Mfg. Co., 55 S. C. 568, 33 S. E. 739 (1899).

[9] In Brooke v. N. Y., L. E. & W. R. Co., 108 Pa. 529, 1 Atl. 206, 56 Am. Rep. 235 (1885), the doctrine was laid down that "as between principal and third parties, the true limit of the agent's authority to bind the former is the apparent authority with which the agent is invested; but as between the principal and the agent the true limit is the express authority, or instruction, given to the agent. The principal is bound by all the acts of his agent within the scope of the authority which he held him out to the world to possess, notwithstanding the agent acted contrary to instructions." Private restrictions cannot affect third persons. Baker v. K. C., St. J. & C. B. Ry. Co., 91 Mo. 152, 3 S. W. 486 (1886).

HAUBELT BROS. v. REA & PAGE MILL CO.

(Kansas City Court of Appeals, Missouri, 1898. 77 Mo. App. 672.)

Plaintiffs were retail grocers. Defendant manufactured flour. One Gardner, a broker, at plaintiffs' request, telegraphed defendant for quotations on flour. Defendant wrote, naming a price of $3.95 per barrel, and at the same time telegraphed. By error in transmission, the telegram read $3.25, and on receipt of the telegram, without waiting for the letter, Gardner sold plaintiff a car load at $3.25.

SMITH, J.[10] * * * Immediately on receipt of this letter, Gardner wired defendant that he had sold the flour at three dollars and twenty-five cents. The defendant, immediately, on the same day, wired Gardner that it would not fill the orders at any such figures. Gardner immediately investigated the matter and ascertained at once that the price in the telegram should have been three dollars and ninety-five cents per barrel.

After ascertaining this fact, Gardner on the same day wrote a letter to the defendant referring to the sale of the flour and to the mistake in the price, and inclosing the memorandum of the sale hereinbefore set forth. At the time the sale was made flour of all grades was advancing in price at Brenham, and continued to advance until after the time the flour in question ought to have been delivered, and at the time delivery should have been made, the flour contracted was worth, on the Brenham market, the sum of $4.05 per barrel, and all other grades had made the same proportionate advance, so that it was impossible for plaintiffs to have purchased any grade of flour without having sustained a loss. Plaintiffs testified that they finally had to buy flour, and pay $4.40 per barrel in order to supply his trade. The plaintiffs further testified on the trial of said cause that, when they bought the flour from said Gardner, the contract was that they were to have a credit of forty-five days, or one and one-half per cent off for cash, and that the flour was to be shipped in ten days.

The plaintiffs by their appeal question the propriety of the action of the trial court in sustaining the demurrer to the evidence adduced. The defendant insists that there was not shown in evidence any such memorandum of the sale as meets the requirements of the statute of frauds and therefore the demurrer was properly sustained. An agent is a competent witness to establish his own agency. Leete v. Bank, 115 Mo. 204, 21 S. W. 788; Pump Co. v. Green, 31 Mo. App. 269. His agency may be implied from the conduct and acquiescence of the principal. Sharp v. Knox, 48 Mo. App. 169; Cummings v. Hurd, 49 Mo. App. 139. And it may be stated as a general rule that wherever a person has held out another as his agent, authorized to act for him in a given capacity, or has knowingly and without dissent permitted such other to act as his agent in such capacity, or where his habits and

[10] Part of the opinion is omitted.

course of dealing have been such as to reasonably warrant the presumption that such other was his agent authorized to act in that capacity, whether it be a single transaction or a series of transactions, his authority to act for him in that capacity will be conclusively presumed so far as it may be necessary to protect the rights of third persons who have relied thereon in good faith and in the exercise of reasonable prudence; and he will not be permitted to deny that such other was his agent authorized to do the act he assumed to do, provided that such act is within the real or apparent scope of the presumed authority. Johnson v. Hurley, 115 Mo. 513, 22 S. W. 492 (quoting Mechem on Agency); Rice v. Groffmann, 56 Mo. 434; Summerville v. Railway, 62 Mo. 391. And it seems well settled in the law of agency that where it appears that an agent had repeatedly performed acts like the one in question, which the principal has ratified and adopted, his authority for the performance of the disputed act may be inferred. Cummings v. Hurd, 49 Mo. App. loc. cit. 139, and cases there cited. Gardner testified that he had been acting as agent of defendant for a number of years in making sale of the latter's flour and that his contracts as such had always been carried out by such latter. He further testified that he sold and handled the defendant's flour as a broker on commission, and that his orders were always promptly filled. One of the plaintiffs testified that he had bought flour of Gardner regularly for three or four years as agent of defendant and the contracts so made with him had always been promptly complied with by defendant. In the light of the precedents just referred to we must conclude that Gardner was the agent of the defendant authorized to make the sale of the flour to plaintiffs. The fact that Gardner was a broker selling on commission rendered him none the less an agent of defendant. Tiedeman on Sales, §§ 271, 272.

Having reached the conclusion that the evidence adduced tends to prove that Gardner was the agent of the defendant, invested with the authority to enter into the contract with the plaintiffs for the sale of the flour, we find no difficulty in reaching the further conclusion that the signing of the written memorandum thereof by Gardner himself was sufficient to meet the requirements of the statute of frauds. Such a contract may be signed for the principal by a person thereunto lawfully authorized, and though the agent sign his own name alone the principal may be still charged by parol evidence. The rule, of course, is otherwise where the agent enters into a contract in his own name under seal. * * *

Gardner offered and sold the plaintiffs the flour in accordance with the authority conferred upon him by the telegram of the defendant. He acted within the scope of that authority in making the sale to the plaintiffs. The plaintiffs appear to have purchased in good faith and are not to be affected by the communications had prior thereto between the defendant and its agent. It seems to us that the plaintiffs made out a prima facie case entitling them to a submission, and there-

fore the action of the court in sustaining the demurrer to the evidence was such an error as requires a reversal of the judgment, which is ordered accordingly. All concur.

II. Secret Instructions

LUDLOW-SAYLOR WIRE CO. v. FRIBLEY.

(Supreme Court of Kansas, 1903. 67 Kan. 710, 74 Pac. 237.)

Pollock, J. The traveling salesman of plaintiff sold defendant company 1,500 bales of wire ties, and reported such sale to have been made at the price of $1.10 per bale, f. o. b. the cars Baxter Springs. This sale was made in February, payment to be made May 1st. Defendant paid on the purchase price $1,425, leaving a balance due, as shown by the account of plaintiff, of $225. This action was brought on a verified account of the transaction to recover the remainder of the purchase price. By verified denial, defendant put in issue the correctness of the account, and also alleged as a complete defense the fact that the traveling salesman, as agent of plaintiff, duly authorized thereto, had guarantied the price of the goods purchased as of the date of payment, May 1, 1900; that the price of like goods f. o. b. the cars Baxter Springs, May 1, 1900, was 95 cents per bale, and not $1.10, as demanded by plaintiff, and alleged the full payment of the purchase price at such figure. By proper reply the authority of the agent to attach such condition to the sale was put in issue. Defendant offered no defense in support of the authority of plaintiff's agent to guarantee the price. There was judgment for defendant. Plaintiff brings error.

The sole question is, was the general authority of plaintiff's agent as traveling salesman, in the absence of notice to the contrary on the part of defendant, as a matter of law, sufficient to bind plaintiff to the conditions attached to the contract of sale as pleaded? The trial court so instructed. The sale of the goods out of which this controversy arose fell directly within the scope of the agent's authority. While that authority may, as between the agent and his principal, have been limited, and the agent responsible to his principal for exceeding its bounds, yet, as between plaintiff and defendant, as no limitation upon the agent's authority was known to defendant, and as the agent acted within the apparent scope of his authority, the conditions attached to the sale bound plaintiff. Babcock v. Deford, 14 Kan. 411; Banks v. Everest & Waggener, 35 Kan. 687, 12 Pac. 141.[11]

It follows that the judgment must be affirmed.

[11] It would be dangerous to hold that a person who invests an agent with an apparent authority could limit that authority by a secret reservation. Edmunds v. Bushell, L. R. 1 Q. B. 97, 12 Jur. N. S. 332, 35 L. J. Q. B. 20 (1865), per Mellor, J. Such a rule would be the height of injustice, and lead to the grossest frauds. Western H. & I. Co. v. Bank, 9 N. M. 1, 47 Pac. 721 (1897). Specific instructions of the principal to the agent can have no effect on

III. Known Limitations

HUTSON v. PRUDENTIAL INS. CO.[12]

(Supreme Court of Georgia, 1905. 122 Ga. 847, 50 S. E. 1000.)

Action on an insurance policy. Exceptions to a nonsuit. A premium due August 1st was offered to, and accepted by, the general agent of the company September 11th, and another payment was made in October for the premium due November 1st. Insured died November 1st. The company refused to pay the policy and returned the above-mentioned payments.

Evans, J. (after stating the facts).† There was evidence tending to establish that Adams was the general agent of the company. Assuming that the evidence was sufficient to establish that he was, did he have authority to waive any of the forfeitures stipulated in the policy? It is elemental that a general agent may bind his principal with respect to all matters within the apparent scope of his authority. Underlying the doctrine of the liability of a principal for the acts of his agent, whether general or special, is this fundamental principle: The agent can only bind his principal within the scope of his agency. Private instructions or limitations not known to persons dealing with an agent who assumes to act within the apparent scope of his authority cannot affect them. In special agencies for a particular purpose, persons dealing with the agent must examine his authority. Civ. Code 1895, § 3023. A general agency does not necessarily import an unqualified authority to act for and in behalf of his principal in every instance. The

third persons, having no notice of such instructions. Rohrbough v. U. S. Exp. Co., 50 W. Va. 148, 40 S. E. 398, 88 Am. St. Rep. 849 (1901). "The authority of the agent must depend, so far as it involves the rights of innocent third persons who have relied thereon, upon the character bestowed, rather than on the instructions given." Austrian v. Springer, 94 Mich. 343, 54 N. W. 50, 34 Am. St. Rep. 350 (1892). Even a special agent who acts within his apparent power binds his principal, even though he acts contrary to private instructions which limit his special authority. Howell v. Graff, 25 Neb. 130, 41 N. W. 142 (1888). A principal cannot escape liability by secret understandings with his agent of which the public can have no knowledge. Hall v. Union Central Life Insurance Co., 23 Wash. 610, 63 Pac. 505, 51 L. R. A. 288, 83 Am. St. Rep. 844 (1900).

Limitations printed in Latin, and not made known to the public, cannot affect the principal's liability to third persons. Catholic Bishop v. Troup, 61 Ill. App. 641 (1895). By-laws of business corporations are, as to third persons, private regulations of no force as limitations upon acts of agents which, but for the by-law, would be within the authority. Rathbun v. Snow, 123 N. Y. 343, 25 N. E. 379, 10 L. R. A. 355 (1890). See, also, Babcock v. Deford, 14 Kan. 408 (1875), per Brewer, J.; Smith v. Droubay, 20 Utah, 443, 58 Pac. 1112 (1899); Patterson v. Neal, 135 Ala. 477, 33 South. 39 (1902); Edwards v. Schaffer, 49 Barb. 291 (1867).

[12] Acc., Longworth v. Conwell, 2 Blackf. 469 (1831), where the limits were not secret, but known to the third party. Marvin v. Universal Life Insurance Co., 85 N. Y. 278, 39 Am. Rep. 657 (1881).

† Part of the opinion is omitted.

agent's authority may be limited, and, if the party dealing with him has notice that his powers have been restricted, his principal will not be bound if he exceeds his authority.

The defendant company in its contract of insurance expressly limited the powers of all of its agents with respect to certain matters. It was expressly covenanted that no condition, provision, or privilege of the policy could be waived or modified in any case except by indorsement on the policy signed by its president or other designated officials. The insured was put upon notice that the premiums were to be paid at the company's home office, or to an agent who held the company's receipt signed by one of its governing officers; and the insured bound himself to pay these premiums on certain specified dates, or within the period of grace provided for in the policy. When the August premium fell due, it was not paid, nor was it paid or tendered within the 30 days' grace thereafter. On September 11th the policy had, under its terms, become lapsed, and the insured and his beneficiary were bound to know this fact. Provision was made in the policy for its being revived within a period of two years, provided past due premiums were paid, together with interest thereon, and provided, further, that the insured furnished to the company satisfactory evidence of his insurability. After the policy had become lapsed, neither the insured, nor any one acting in his behalf, made to the defendant company an application for a revival of the insurance, or furnished the defendant with any proof of the insurability of the insured.

Plaintiff maintains that the acceptance of the August premium by the general agent without requiring an application for revival, or proof that the insured was in good health, amounted to a waiver of the stipulations in the policy touching the manner in which it might be revived. This contention is not sound, for the reason that there was an express provision in the policy that no waiver of any forfeiture could be made, save by certain designated officials of the company, and that no agent had any power to waive any stipulations upon which the contract of insurance was based. * * *

We have not dealt with the question as to the admissibility of the testimony of Adams, the general agent, with regard to the circumstances under which he received the money for the August premium, for the reason that, had this testimony been excluded, the result would inevitably have been the same. Judgment affirmed.

BANK v. OHIO VALLEY FURNITURE CO.

(Supreme Court of Appeals of West Virginia, 1905. 57 W. Va. 625, 50 S. E. 880, 70 L. R. A. 312.)

Exception to a directed judgment for $2,625.96, on a note for $2,500, signed by the defendant, and indorsed in blank by the payee and prominent stockholders of defendant company. The note, one of several similar notes, was sent to one Huston, agent of defendant, to be discounted, the proceeds to be sent to defendant. Huston represented to the bank that he was agent of the maker, but that he had secured authority to discount the note for his own benefit. As he was well known to plaintiff bank, and had an account there, the cashier discounted the note.

POFFENBARGER, J.[13] * * * When the party has possession of the paper, and neither the fact of agency nor any other circumstance inconsistent with title in the holder is known to the other party, he may deal on the basis of ownership, although there is in fact an unknown agency. He may take good title despite this indisputable fact of which he has no knowledge. These cases furnish no authority for the position that the note is the equivalent of a power of attorney. Ownership of the note, and possession thereof in the capacity of agent, are inconsistent things. Ownership includes, of course, all powers of control and disposition. Agency is no part of this, but is a new and distinct thing which the owner may create out of it and in respect to it. If the holder is the owner, he cannot be the agent of himself, because his agency is merged in his ownership. Had the fact of agency been known in any of these cases, it would therefore have negatived the possibility of ownership in the holder, and no dealings could have been had with him on the basis of ownership.

Knowledge of the fact of agency destroys the apparent title of the holder, and the intending purchaser must then look to the authority of the agent. That one having possession of negotiable paper has only prima facie title has been demonstrated by cases already cited relating to accommodation paper. The same principle certainly allows a man to part with a title by admission which can be defeated by proof. The note cannot be considered a power of attorney, giving such authority as is claimed, for the power would run into ownership, a status which negatives the character of agency necessarily. "If the agency of the party is made to appear, the principal will not be bound beyond the authority given.[14] And, where the holder has notice that the party

[13] Part of the opinion is omitted.

[14] A principal may limit the authority of his agent, and when he does so the agent cannot bind his principal beyond the limits of his authority, by contract, estoppel, or waiver, to those who know the limitations of his power. Modern Woodmen v. Tevis, 117 Fed. 369, 54 C. C. A. 293 (1902). Instructions

acting as agent is such, he is bound to inquire into his authority." Rand. Commer. Paper, § 388.

The maker, by constituting the agency and intrusting the note to the agent in such form that it might be disposed of by mere delivery, held the agent out to the world as possessing power to pass the title to it. Upon the apparent authority with which the principal had thus clothed the agent, persons dealing with the latter might rely, if they had no notice of any limitation upon such authority. "Private instructions to a general agent circumscribing his power will not avail to shield the principal from liability to parties dealing with him in ignorance of the limitation. But if such persons are aware of the instructions, the principal is not bound." 1 Am. & Eng. Ency. Law (2d Ed.) 994. "A principal may confer as much or as little authority as he sees fit upon his agent, and he may also impose such lawful restrictions and limitations upon his agent as he may deem proper, and such restrictions and limitations will be as binding upon third persons who had notice of them as upon the agent himself, provided the principal does nothing to waive them." Lead Pencil Co. v. Wolfe, 30 Fla. 360, 11 South. 488. The law does not permit an agency to be loaded down with secret instructions inconsistent with the authority actually or apparently conferred, but if a stranger dealing with the agent knows of the limitation, he has no cause for complaint, and in this respect there is no difference between a general and a special agency. 1 Am. & Eng. Ency. Law (2d Ed.) 994, 995. "If limitation of the agent's authority is public, or known to the person with whom he deals, the principal will not be bound if the agent exceeds his authority; but if such limitation be private, the agent may bind his principal, although the former exceed his authority." Bryant v. Moore, 26 Me. 84, 45 Am. Dec. 96. "If the shipper of goods on freight contracts for the price thereof with the general agent of the owner of the vessel, having reason to know, that although his agency might be general, yet that his authority was restricted in that particular instance, the shipper cannot claim to have the terms of the contract fulfilled as against the principal of such agent." Barnard v. Wheeler, 24 Me. 412.

The difference between general and special agencies in the law of commercial paper is stated in Daniel on Negotiable Instruments, at section 278, as follows: "Where the agency is specially given to do a particular thing, the agent is circumscribed within the limits of actual authority; but where the agency is general—as that of a bank cashier, for instance—all acts within the scope of that general authority are binding on the principal." On the subject of limitation of authority, this work says, in the next sentence, "And if he seeks to avoid liability, he must show not only limitation of the general authority, but also that the party dealing with the agent had notice." Under the au-

to the agent, known to the third person, limit the authority of the agent to bind the principal, whether the agent be general or special. U. S. v. Williams, Fed. Cas. No. 16,724, 1 Ware 173 (1830).

thority conferred upon the agent in this case by placing the note in his hands, ready for delivery to a purchaser, he could have passed the title to a purchaser who knew that he was acting in the capacity of agent. The purchaser would have been warranted in relying upon the apparent authority with which the agent was clothed, provided he knew of no limitation. Bank v. Real Estate Co., 150 Mo. 570, 51 S. W. 691.

The declaration on the part of the holder, after having admitted the agency, that he had secured the right to use the note for his own benefit, calls for the application of another principle of the law of agency, which is a limitation imposed by law upon the power of every agent, general or special, of which all persons must take notice, namely, that an agent has no power to use his office otherwise than for the benefit of his principal. When he undertakes to exercise it for a purpose which can in no way benefit his principal, but will benefit himself or some third person, he places himself in a position in which the law determines that he is outside of the scope of his agency, and the person who deals with him in such position will not be heard to say he was in ignorance of the want of authority, for ignorance of law excuses no man. It is of the very essence of an agency that it shall be used for the benefit of the principal. Men appoint agents to subserve their interests, carry on their business, preserve their property, and not for the purpose of giving it away to others and converting it to their own use. "If one who is known to be an agent for the negotiation of his principal's draft transfer the draft to a third person in payment of the agent's debt, that person will acquire no title to the draft, however honest his actual intention may be. The declarations of an agent, although accompanying his acts, constitute no evidence of the extent of his authority. * * * If a transaction between an agent and another person be entire, and be known to such other person to be a breach of trust on the part of the agent, the principal is not bound at all, although some portions of the transaction might, if standing alone, have been within the agent's power and duty." Dowden v. Cryder, 55 N. J. Law, 329, 26 Atl. 941.

The reasons underlying these legal propositions are stated in the opinion in the case just cited, as follows: "It is a universal principle in the law of agency that the powers of the agent are to be exercised for the benefit of the principal, and not of the agent or third parties. Persons dealing with one whom they know to be an agent and to be exercising his authority for his own benefit acquire no rights against the principal by the transaction. Such a transaction is usually, and perhaps properly, spoken of by the courts as fraudulent; but, however honest the intention of the parties, the agent's act is invalid, merely because the circumstances known to both prove it to be ultra vires." Tiedeman on Commer. Paper, § 92, says: "It is implied in every agency, in the absence of express evidence to the contrary, that the power of the agent is to be exercised for the benefit of the principal, and not for his own private advantage." This principle was applied by

the Supreme Court of Virginia in Stainback v. Bank of Virginia, 11 Grat. 269, in which, after stating the nature of the agent's powers, the court held as follows: "A party dealing with the agent, with knowledge or means of knowledge that under such a power he is indorsing the name of his principal for his own benefit, is not entitled to recover from the principal." In Stainer v. Tysen, 3 Hill 279, the rule is declared in this language: "The naked power to do acts for and in the name of the principal negatives all authority on the part of the attorney to act for the benefit of any one besides the principal, and persons dealing with the attorney as such are bound to notice this limitation." Other cases illustrating the rule are Bank v. Aymar, 3 Hill 262; Suckley v. Tunno, 1 Brev. 257; Holden v. Durant, 29 Vt. 184, Odiorne v. Maxcy, 13 Mass. 178; Bank v. Studley, 1 Mo. App. 260.

Most of these are cases in which the agent pledged or sold the paper in payment of his own debt, so that the third party dealing with him derived a peculiar benefit from the unauthorized transaction. This, however, does not seem to be the reason for denying validity of title in such purchaser. It seems to stand upon the want of authority in the agent to exercise his powers for his own benefit or for the benefit of anybody except his principal. Knowledge of this perversion of authority on the part of the purchaser is necessary to the invalidity of his title, of course. But when he does have such knowledge, he is bound to know the want of authority in the agent to so use his powers. In the case of Dowden v. Cryder the purchaser was not a creditor of the agent. He took the draft in exchange for $2,060 in cash and a diamond necklace valued at $1,100. There was no advantage in the transaction to the purchaser, except a possible profit on the necklace and the discount of $40 allowed. In Trust Co. v. Abbott, 44 N. J. Law, 257, the agent held a power of attorney authorizing him to sign the principal's name to any paper or papers, notes, etc. He drew a note in his own favor, and signed the principal's name by himself as agent, and sold it to the defendant. In the action on the note, the court held that the power did not justify the signing of such documents as were described in it for purposes outside of the principal's business, and that the burden was upon the plaintiff to show that he was a bona fide holder, for value, before maturity. In stating the reason for the rule, the court said: "But in whichever form the instrument was delivered, it did not justify the signing of notes for purposes outside of the principal's business. The note in suit was not given for such a purpose, but was put forth for the personal benefit of the attorney, who converted its proceeds to his own use. It was therefore issued under an apparent authority, but in fraud of the principal." The court reversed the judgment in favor of the plaintiff, because the evidence did not show when, from whom, and under what circumstances the attorney had received the money.

The same principle was enunciated and applied by this court in Rohrbough v. Express Co., 50 W. Va. 148, 40 S. E. 398, 88 Am. St.

Rep. 849. See, also, Express Co. v. Trego, 35 Md. 47. This is a heavy penalty to visit upon the bank, but nothing worse than would have befallen it had any other limitation upon the agent's power been disregarded. Other instances of such penalties, consequent upon non-observance of legal rights, are to be found all along the beaten highway of the administration of the law. Take one who pays full value for property, knowing the sale is made to defraud creditors. He loses everything, while, if the same sale had been made to a person ignorant of the intent, it would have been valid.

On the basis of an assertion of title to the note and repudiation of the agency by the representation of right to use the money, the case stands no better. If Huston had no title under the paper, taken in connection with his former representation of agency, the bank had no right to rely upon his mere verbal assertion of title. Title to property cannot be acquired in that way. Having knowledge of a fact, sufficient to put it upon inquiry, at least—the admission of agency—the bank was bound to make a proper inquiry, and this requirement could not be satisfied by an inquiry directed to the party whose interest it would be to misinform as to, and deny, the very fact sought for. 7 Cyc. 942; Carter v. Lehman, 90 Ala. 126, 7 South. 735.

For the error of the court in excluding the defendant's evidence and directing a verdict for plaintiff, the judgment must be reversed, the verdict set aside, a new trial allowed, and the case remanded.

IV. Usage and Custom

CAWTHORN v. LUSK.

(Supreme Court of Alabama, 1892. 97 Ala. 674, 11 South. 731.)

Head, J. The action is brought by appellants to recover damages for the breach of an agreement for the sale of 800 sacks of dried grapes, made by Stollenwerck & Co., as agents of defendants. The case was tried by the city court without a jury, and judgment rendered for defendants. The sale of the grapes by Stollenwerck & Co. at 3½ cents per pound f. o. b. to be delivered in September and October following, and that the intention and understanding of these parties was that the sale was a finality; also that defendants refused to deliver the grapes,—are uncontroverted facts. The only disputed question of fact relates to the authority of Stollenwerck & Co. to bind defendants by the contract of sale, without first submitting it for their acceptance or rejection.

Defendants, who reside and are doing business in California, while conceding that Stollenwerck & Co. are their agents or brokers in Birmingham, Ala., to sell dried fruits, claim that they were only authorized to make contracts of sale subject to confirmation. That such

is the nature and extent of their general authority is shown by the letter of instructions, dated July 9, 1890, sent by defendants to them, and by the general custom of the trade, of which plaintiffs, having been engaged in the same business in Birmingham for several years, are chargeable with notice.

The question then arises whether authority, express or implied, was subsequently conferred to sell the grapes at 3½ cents per pound. Plaintiffs claim that such authority is implied from a telegram sent by defendants to Stollenwerck & Co., when interpreted by the custom and usage of the trade. The law presumes that when a commercial agency is to be exercised, in the absence of limitation or prohibition, it is to be conducted in the mode authorized and justified by the customs and usages of such trade or business. In Guesnard v. Railroad Co., 76 Ala. 453, this doctrine is asserted as follows: "Where a mercantile agency is to be executed at a particular place, the principal who employs the agent is presumed to consent that he may execute it, in the absence of particular instructions, according to the general custom and usage relating to that kind of trade or business, whatever it may be. The law implies that he gives his consent for his agent to act as all other similar agents who are honest and diligent are accustomed to do; and it is immaterial, as a general rule, whether the principal is informed as to such customs and usages or not." It is true that, when an agency is created by a written instrument, the nature and extent of the authority must be ascertained from the instrument itself, and cannot be enlarged by parol proof. This rule is not violated by the admission of proof of the usages of trade. They are admitted, not for the purpose of enlarging, but of interpreting, the powers actually given. Says Judge Story: "The known usages of trade and business often become the true exponents of the nature and extent of an implied authority." Story, Ag. § 96; Wheeler v. McGuire, 86 Ala. 398, 5 South. 190, 2 L. R. A. 808.

The telegram referred to was sent by defendants to Stollenwerck & Co. July 18, 1890, and is as follows: "Cannot offer dried grapes below 3½ f. o. b. Have advanced to 3¾." This telegram was in response to one sent by Stollenwerck & Co. to defendants the day before, of which the following is a copy: "Ormsby offering dried grapes 4.70. Can't you let us meet that price?" The evidence shows a custom or usage of the trade to the effect that a telegram sent by the principal to the broker, giving a price, without any stipulation in the telegram that sales made at such price shall be subject to confirmation by the principal, is authority to the broker to sell finally and unconditionally at that price, no matter what the prior instructions were. This custom is testified to by two witnesses, whose testimony is uncontradicted. True, Isadore Jacobs, who represents defendants, testifies: "None of our letters or telegrams to Stollenwerck & Co. instructed them to sell dried grapes, our instructions being to take orders for dried grapes subject to confirmation; and, even if letters or telegrams had been

sent instructing brokers to sell, it would be understood that they could only sell subject to confirmation, unless specially stated, 'You may sell without confirmation.' "

It will be observed that the witness does not deny the existence of the custom, but only testifies to the private understanding between defendants and their brokers. Such private understanding is not binding on plaintiffs, unless communicated to them. There is no pretense that it was communicated; on the contrary, the evidence shows that the telegram of July 18, 1890, was shown to plaintiffs as Stollenwerck & Co.'s authority to make a final and unconditional sale. We find from the evidence that there was such custom. Considering the telegram in connection with the one to which it was a response, it might well be contended, without reference to the custom, that it was at least implied authority to sell dried grapes at 3½ cents per pound f. o. b. But it is not necessary to so find. There being no instruction or stipulation in the telegram that sales at that price are subject to confirmation, Stollenwerck & Co. were thereby authorized under the custom to sell finally and unconditionally the grapes to plaintiffs, and defendants are bound by the contract of sale to the same extent as if they had sold the grapes. Herring v. Skaggs, 62 Ala. 180, 34 Am. Rep. 4.[15]

The measure of damages is the difference between the price which plaintiffs agreed to pay for the grapes, including cost of transportation to Birmingham, and the market price at Birmingham at the time of delivery, with interest. Under the evidence, we assess the plaintiffs' damages at the sum of $945. The judgment of the city court is reversed, and a judgment will be entered in this court in favor of the plaintiffs for said sum of $945, together with the costs in this court and the city court.

This opinion, except as to assessment of damages, was prepared by the late Justice CLOPTON. Reversed and rendered.

[15] Accord: Lowenstein v. Lombard, 164 N. Y. 324, 58 N. E. 44 (1900); Cruzan v. Smith, 41 Ind. 288 (1872), quoting Story on Agency.

A merchant in London, who employs an agent in Liverpool, is bound by the usage of trade at Liverpool. Graves v. Legg, 2 H. & N. 210, 26 L. J. Ex. 316, 3 Jur. (N. S.) 519, 5 W. R. 597 (1857). One who authorizes his agent to sell on the Stock Exchange by implication authorizes a sale in the form and on the conditions usual on the Stock Exchange. Harker v. Edwards, 57 L. J. Q. B. 147 (1887). But the custom must affect only the mode of performing the contract and not its intrinsic character. Robinson v. Mollett, 44 L. J. C. P. 362, L. R. 7 H. L. 802, 33 L. T. 544 (1874), reversing 20 W. R. 544 (1872).

GATES IRON WORKS v. DENVER ENGINEERING WORKS CO.

(Court of Appeals of Colorado, 1901. 17 Colo. App. 15, 67 Pac. 173.)

Action for the price of mining machinery, sold by the Denver Company to one Berkey, who was sales agent of the Gates Company. On the window of his office was printed: "Gates Iron Works, B. L. Berkey, Manager. Mining Machinery of all Kinds." His cards and letter heads contained similar statements. Plaintiff made no further inquiry as to Berkey's authority. From a directed verdict for plaintiff, defendant appeals.

THOMSON, J.[16] * * * Discussing the question of the duty of third persons dealing with an ostensible agent, Mr. Mechem says: "In approaching the consideration of the inquiry whether an assumed authority exists in a given case, there are certain fundamental principles which must not be lost sight of. Among these are, as has been seen: That the law indulges in no bare presumption that an agency exists. It must be proved or presumed from facts. That the agent cannot establish his own authority, either by his representations or by assuming to exercise it. That an authority cannot be established by mere rumor or general reputation. That even a general authority is not an unlimited one, and that every authority must find its ultimate source in some act of the principal. Persons dealing with an assumed agent, therefore, whether the assumed agency be a general or special one, are bound, at their peril, to ascertain not only the fact of the agency, but the extent of the authority; and, in case either is controverted, the burden of proof is upon them to establish it." Mechem, Ag. § 276. In Lester v. Snyder, 12 Colo. App. 351, 55 Pac. 613, the foregoing was expressly approved.

In the case at bar Mr. Miller, the general manager of the plaintiff, who conducted the transaction in question in its behalf, made no inquiry with reference to the authority of Mr. Berkey; and neither himself nor his company had any knowledge of the relations existing between Berkey and the defendant, except what was shown by the letter head, sign, card, and circular. It was in reliance upon these that the property was sold. Mr. Berkey was the general agent of the defendant at Denver. He was the manager of its Denver office. The defendant was bound by the acts of Mr. Berkey within his apparent authority. Where a person holds out another to the public as having a general authority to act for him in the particular business in which he is engaged, third persons may safely deal with the agent in the transaction of such business. But there is a limit to the authority of an agent, general or special, and the principal is not bound by his act outside of such limit. No matter how extensive the authority of an

[16] Part of the opinion is omitted.

agent may be in the transaction of his principal's business, it is still confined to that business; and his act outside of the boundary by which the business is circumscribed would not bind his principal. Stewart v. Woodward, 50 Vt. 78, 28 Am. Rep. 488; President, etc., of Mechanics' Bank v. New York & N. H. R. Co., 13 N. Y. 599; Richmond v. Greeley, 38 Iowa, 666; Fougue v. Burgess, 71 Mo. 389; Edwards v. Dooley, 120 N. Y. 540, 24 N. E. 827; Navigation Co. v. Dandridge, 8 Gill & J. 248, 29 Am. Dec. 543; McAlpin v. Cassidy, 17 Tex. 450; Story, Ag. § 87.

Now, Mr. Miller knew that the defendant was engaged in the manufacture of general mining machinery. He was so advised by the letter head. The sign on the window appears to have been substantially the same as the letter head. The card did not describe the defendant as a manufacturer, but presented a picture of its manufacturing establishment and machine shops, with the words "Mining Machinery of Every Description"; and, as Berkey was held out as the agent of a manufacturer, his apparent authority extended only to the sale of the goods manufactured by his principal. That the defendant allowed him to style himself its manager is immaterial, because he could bind the defendant only in the management of the business in which it was engaged. There was nothing in the evidence of authority which Mr. Miller saw and upon which he relied to warrant him in assuming that Mr. Berkey had any authority to buy mining machinery. So far as appearances went,—at least appearances for which the defendant was responsible,—the purchase of mining machinery was no part of the defendant's business; and there was nothing to indicate that Mr. Berkey was empowered to act outside of its business. There was no apparent authority in Berkey to buy this machinery, and, in order to bind the defendant by his contract, the burden was on the plaintiff to prove that the purchase was specially authorized by it. Mining Co. v. Fraser, 2 Colo. App. 14, 29 Pac. 667.

While the plaintiff, in making the sale, relied exclusively upon the visible indicia of Berkey's authority, at the trial it undertook to prove a custom among agencies handling mining machinery in Denver of purchasing goods from local companies. When or how the custom originated, or how long it lasted, is not stated, except that it prevailed in Denver in the fall and winter of 1896 and 1897. We do not think this assertion of a custom requires very elaborate discussion. Respecting the effect which custom or usage may have upon the manner in which an agent may transact the business of his principal, Mr. Mechem says: "Where the principal confers upon his agent an authority of a kind or empowers him to transact business of a nature in reference to which there is a well-defined and publicly known usage, it is the presumption of the law, in the absence of anything to indicate a contrary intent, that the authority was conferred in contemplation of the usage; and third persons, therefore, who deal with the agent in good faith and in the exercise of reasonable prudence, will be protected

against limitations upon the usual authority, of which they had no notice. In order to give the usage this effect, it must be reasonable; it must not violate positive law; and it must have existed for such a time, and become so widely and generally known, as to warrant the presumption that the principal had it in his view at the time of the appointment of the agent."

It is only, however, the mode of transacting the business which can be affected by usage. No man can be compelled by custom to alter the character of his business. Concluding the section from which we have already quoted, Mr. Mechem says further: "Usage, however, cannot operate to change the intrinsic character of the relation, nor will it be permitted, as between the principal and the agent, or as between the principal and third persons having notice of them, to contravene express instructions, or to contradict an express contract to the contrary. So a usage not known to the principal cannot operate to authorize the making of an invalid instead of a valid contract, or to bind him to take one thing when he has ordered another."

Aside from the fact that the custom mentioned in the evidence here was not defined, it had no such term of existence as to make it binding on any one; but, waiving this objection, whatever may have been its nature and limits, it could afford no protection to the plaintiff. So far as the plaintiff knew or had any right to believe, and so far as we know or have any right to believe, the business of the defendant was confined to the manufacture and sale of mining machinery; and no custom in any locality where it sent an agent to act for it could force it to do a different business. Presumptively because it manufactured mining machinery it did not desire to buy mining machinery, and no custom, however ancient or well-defined, could compel it to do so.[17]

It seems that some time after the transaction in question Berkey informed the defendant of his purchase as having been made on his own account, and the defendant proposed to assist him in doing an individual business, but there was no ratification. Proof was proffered by the defendant that it knew nothing of the purchases as having been made for it, that Berkey had no authority to make the purchase, and that it never in any manner recognized the purchase as having been made in its behalf; but the evidence was all excluded. Of course, the exclusion was error; but it can hardly be said that it worked harm to the defendant. The burden was on the plaintiff to prove the agent's authority and every fact which might tend to make his contract the contract of his principal, and, in the absence of such proof, disproof by the

[17] General customs are judicially known, and form part of the law. Local customs cannot alter the law, and must be proved. Moore v. Tickle, 14 N. C. 244 (1831). What is usual is not always matter of judicial knowledge. Existence of a custom is often for the jury on the evidence. Reese v. Bates, 94 Va. 321, 26 S. E. 865 (1897); Hichborn v. Bradley, 117 Iowa, 130, 90 N. W. 592 (1902).

defendant was unnecessary. Upon the evidence there was no question to submit to the jury. To this extent we agree with the court. But it was on the plaintiff's side that the failure was, and the judgment should have been for the defendant.

The judgment is reversed, and the cause remanded for further proceedings in accordance with the views herein expressed. Reversed.

FARNSWORTH v. HEMMER.

(Supreme Judicial Court of Massachusetts, 1861. 1 Allen, 494, 79 Am. Dec. 756.)

Contract, brought by a real estate broker to recover a commission for his services in negotiating an exchange of land between the defendant and Fanny W. Cooper.

At the trial in the superior court, it appeared that the plaintiff was a real estate broker, and was employed by the defendant to negotiate the sale or exchange of certain real estate in Boston, and that through his aid an exchange thereof was effected with Mrs. Cooper for real estate owned by her, which she in like manner had employed the plaintiff to aid her in selling or exchanging, before his employment by the defendant, and that he accordingly acted for both parties, and charged a commission to both, and that he had commenced an action which was still pending against Mrs. Cooper, to recover the commission charged to her. The plaintiff never informed the defendant that he was acting for Mrs. Cooper, and there was no evidence that the defendant knew the fact. The plaintiff offered evidence of a custom among the brokers of Boston to charge a commission to both parties in cases like the present, and the defendant, for the purpose of testing the validity of such custom, admitted that it could be proved to exist, but claimed that, if proved, it was a bad custom, and invalid in law; and Lord, J., so ruled. A verdict was accordingly returned for the defendant, and the plaintiff alleged exceptions.

BIGELOW, C. J. The principle on which rests the well-settled doctrine, that a man cannot become the purchaser of property for his own use and benefit which is intrusted to him to sell, is equally applicable when the same person, without the authority or consent of the parties interested, undertakes to act as the agent of both vendor and purchaser. The law does not allow a man to assume relations so essentially inconsistent and repugnant to each other. The duty of an agent for a vendor is to sell the property at the highest price; of the agent of the purchaser to buy it for the lowest. These duties are so utterly irreconcilable and conflicting that they cannot be performed by the same person without great danger that the rights of one principal will be sacrificed to promote the interests of the other, or that neither of them will enjoy the benefit of a discreet and faith-

ful exercise of the trust reposed in the agent. As it cannot be supposed that a vendor and purchaser would employ the same person to act as their agent to buy and sell the same property, it is clear that it operates as a surprise on both parties, and is a breach of the trust and confidence intended to be reposed in the agent by them respectively, if his intent to act as agent of both in the same transaction is concealed from them. It is of the essence of his contract that he will use his best skill and judgment to promote the interest of his employer. This he cannot do, where he acts for two persons whose interests are essentially adverse. He is therefore guilty of a breach of his contract. Nor is this all. He commits a fraud on his principals in undertaking, without their assent or knowledge, to act as their mutual agent, because he conceals from them an essential fact, entirely within his own knowledge, which he was bound in the exercise of good faith to disclose to them. Story on Agency, § 31; Copeland v. Mercantile Ins. Co., 6 Pick. 198, 204; Pugsley v. Murray, 4 E. D. Smith, 245; Rupp v. Sampson, 16 Gray, 398, 77 Am. Dec. 416.

Such being the well-settled rule of law, it follows that the evidence offered by the plaintiff was inadmissible. A custom or usage to be legal and valid must be reasonable and consistent with good morals and sound policy, so that parties may be supposed to have made their contracts with reference to it.[18] If such a usage is shown to exist, then it becomes the law by which the rights of the parties are to be regulated and governed. But the usage on which the plaintiff relied was wanting in these essential elements. It would be unreasonable, because, if established, it would operate to prevent the faithful fulfillment of the contract of agency. It would be contrary to good morals and sound policy, because it would tend to sanction an unwarrantable concealment of facts essential to a contract, and operate as a fraud on parties who had a right to rely on the confidence reposed in their agents. Exceptions overruled.

BARKSDALE v. BROWN.

(Constitutional Court of South Carolina, 1815. 1 Nott & McC. 517, 9 Am. Dec. 720.)

Action for the proceeds of rice sent to defendants to sell as factors, with instructions to sell for cash. They sold to one Powers, who shipped it and went off without paying for it.

NOTT, J.[19] That usage does, in many instances constitute the law, and that contracts must be construed with reference to the usage of

[18] A usage in contravention of a well-settled and salutary rule of law cannot be sustained by courts of justice. Raisin v. Clark, 41 Md. 158, 20 Am. Rep. 66 (1874); Ferguson v. Gooch, 94 Va. 1, 26 S. E. 397, 40 L. R. A. 234 (1896); Robinson v. Mollett, L. R. 7 H. L. 802, 44 L. J. C. P. 362, 33 L. T. Rep. N. S. 544 (1874).

[19] Part of the opinion is omitted.

trade or business to which they relate, are principles too well established to be questioned now. Numerous examples are to be found among the cases arising on policies of insurance; and perhaps no stronger case can be found than that of three days grace allowed in cases of bills of exchange. But to entitle a usage to that high respect, it must be a reasonable one. It must be for the benefit of trade generally, and not for the convenience and benefit of a particular class of individuals.[20] And I can conceive of no usage that will authorize a departure from positive instructions. The instructions of a principal to his agent make the law by which he is to be governed. And to authorize him to depart from them would be depriving the parties of the privilege of making their own terms. I can see no benefit resulting to the community from such usage. It is calculated rather to destroy that confidence which is necessary for the encouragement of trade. No planter would dare to trust his property in the hands of a factor upon such terms. That such courtesy has been indulged until now, and that it would be thought uncivil to refuse it, I have no doubt; and I have as little doubt that any factor attempting a different method of doing business would suffer by it. But let it once become general, and no inconvenience would result. Let it be understood that a factor is to give indulgence at his own risk, and that he is not to sacrifice the interest of the planter to the feelings of the merchant, and the evil will correct itself.

I do not mean to say that no confidence is to be placed in the man of good credit, or that property may not, in any instance, be delivered to the purchaser until the money is paid. On the contrary all the confidence which is necessary, in the usual course of business, I think ought to be allowed. I should have thought that if the factors had received a check on a bank for the money when they delivered the rice, that they would have acted within the scope of their authority, even though it had been dishonored. Such conduct in a purchaser would have been a species of swindling against which it could not have been expected that the seller would have been guarded. The whole doctrine, indeed, may be expressed in a few words. If a factor reposes a confidence which amounts to giving credit to a purchaser, when he has been directed to sell for cash, he does it at his own risk, and must be answerable for the consequences. * * *[21]

Motion for a new trial refused.

[20] Accord: Hall v. Storrs, 7 Wis. 253 (1858): "The general rule in regard to the admissibility of usage requires that it should be reasonable, certain, and consistent with the general known import of the words used in the contract to which the usage is to be applied." Redfield, J., in Catlin v. Smith, 24 Vt. 85 (1851). Cf. Smith v. Wilson, 3 B. & Adol. 728 (1832); Clark v. Van Northwick, 1 Pick. 343 (1823). Proof of usage is admissible to interpret the meaning of the contract, or, where its meaning is equivocal or obscure, to ascertain its nature and extent, but not to vary its terms, or introduce new conditions, or contravene the specific instructions to the agent. Parsons v. Martin, 11 Gray, 111 (1858).

[21] The dissenting opinion of Cheves, J., is omitted.

SECTION 3.—APPARENT AUTHORITY

I. In General

PICKERING v. BUSK.

(Court of King's Bench, 1812. 15 East, 38, 13 Rev. Rep. 364.)

Trover for hemp. Swallow, a broker, had bought for plaintiff two parcels of hemp, one of which was transferred in the books of the wharfinger to the name of Swallow, the other to the name of Pickering or Swallow. The hemp was paid for by the plaintiff, and later sold by Swallow to defendant's assignor in bankruptcy.

Lord Ellenborough, C. J. It cannot fairly be questioned in this case but that Swallow had an implied authority to sell. Strangers can only look to the acts of the parties, and to the external indicia of property, and not to the private communications which may pass between a principal and his broker, and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority, I cannot subscribe to the doctrine, that a broker's engagements are necessarily and in all cases limited to his actual authority, the reality of which is afterwards to be tried by the fact. It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect of the subject matter; and there would be no safety in mercantile transactions if he could not. If the principal send his commodity to a place, where it is the ordinary business of the person to whom it is confided to sell, it must be intended that the commodity was sent thither for the purpose of sale. If the owner of a horse send it to a repository of sale, can it be implied that he sent it thither for any other purpose than that of sale? Or if one send goods to an auction-room, can it be supposed that he sent them thither merely for safe custody? Where the commodity is sent in such a way and to such a place as to exhibit an apparent purpose of sale, the principal will be bound, and the purchaser safe.

The case of a factor not being able to pledge the goods of his principal confided to him for sale, though clothed with an apparent ownership, has been pressed upon us in the argument, and considerably distressed our decision. The court, however, will decide that question when it arises, consistently with the principle on which the present decision is founded. It was a hard doctrine when the pawnee was told that the pledger of the goods had no authority to pledge them, being a mere factor for sale; and yet since the case of Paterson v. Tash, that doctrine has never been overturned. I remember

Mr. Wallace arguing in Campbell v. Wright, 4 Burr. 2046, that the bills of lading ought to designate the consignee as factor, otherwise it was but just that the consignors should abide by the consequence of having misled the pawnees. The present case, however, is not the case of a pawn, but that of a sale by a broker having the possession for the purpose of sale. The sale was made by a person who had all the indicia of property; the hemp could only have been transferred into his name for the purpose of sale; and the party who has so transferred it cannot now rescind the contract. If the plaintiff had intended to retain the dominion over the hemp, he should have placed it in the wharfinger's books in his own name.

GILLMAN v. ROBINSON.[22]

(At Nisi Prius in the Court of Common Pleas, 1825. 1 Car. & P. 642, Ryan & M. 226, 28 Rev. Rep. 795, 12 E. C. L. 364.)

Assumpsit for goods sold. One Womack ordered goods on defendant's account, but intercepted them on the way, and applied them to his own use. He had bought goods of plaintiffs and others several times before as the agent of defendant, for which defendant had paid.

BEST, C. J. Upon principle, if a man holds another out to the world as his general agent, he is responsible for his acts; and it is important that it should be so, because, otherwise, a man might accredit another, and, after he had cheated many to their ruin, turn round and say, Though this man appeared as my agent, yet he had no authority from me. You must be satisfied, not only that the goods were ordered for the defendant, but that the authority of the party ordering them was so far recognized as to render the defendant responsible. It is admitted, that, in the cases of policies and bills of exchange, agency is proved by several instances. This feature in the law of agency is not confined to those cases, but applies equally and similarly to the ordering of goods.

Verdict for the plaintiffs.

ANTRIM IRON CO. v. ANDERSON.

(Supreme Court of Michigan, 1905. 140 Mich. 702, 104 N. W. 319, 112 Am. St. Rep. 434.)

CARPENTER, J.[23] Plaintiff brings this action of replevin to recover timber cut from section 31, Star township, Antrim county, Mich., by one Elgie Dow, and by Dow sold to defendant. On the 10th of September, 1902, plaintiff, the owner of said timber, acting through

[22] Another case, based upon orders of the same agent, was similarly decided in the Court of King's Bench. Todd v. Robinson, Ryan & Moody, 217. 21 E. C. L. 736 (1825).

[23] Part of the opinion is omitted.

its agent, Charles L. Bolio, entered into a contract with Dow, whereby Dow agreed to cut, skid, draw, and load on cars the timber in question and the timber standing on four other sections belonging to plaintiff. In February, 1903, this contract was rescinded, and a new and oral contract made, by which Dow purchased from the plaintiff, through said Bolio, its agent, certain timber standing on the land covered by the former written contract.

There is a dispute as to what standing timber was embraced in this new oral contract. Plaintiff's testimony tends to prove that it covered all the standing timber embraced in the written contract, except that on section 31. Defendant's testimony tends to prove that it covered the standing timber on all the land embraced within the written contract, including that on section 31. At the time this oral contract was made it was contemplated by Bolio and Dow that it should be put in writing; and that in the meantime, according to the testimony of the defendant, Dow might enter upon the lands, and commence cutting and removing the timber. Bolio testifies that he subsequently did execute a writing, and mail it to Dow, and that in this writing the timber standing on section 31 was not included. Dow testifies that this writing was never received by him, and that before he was interfered with he had cut the timber in question. It is conceded that the consideration paid by Dow was actually received by plaintiff. Plaintiff never gave Bolio any written authority to act for it, nor any express verbal authority to sell the timber standing on section 31. The issue was submitted to a jury, who rendered a verdict for the defendant. Plaintiff brings the case to this court, and urges many reasons why the judgment entered on said verdict should be reversed.

We answer many of those reasons by saying, first, though the contract to sell the standing timber was invalid as a contract because not in writing (see Russell v. Myers, 32 Mich. 522), it was good as a license, and the timber, having been cut before the license was revoked, became the property of Dow; second, it was not necessary that the agent who gave this license should have written authority. Spalding v. Archibald, 52 Mich. 365, 17 N. W. 940, 50 Am. Rep. 253, is authority for each of the foregoing propositions.

Plaintiff contends that there was no evidence tending to prove that Bolio had even verbal authority to sell this timber to Dow. The undisputed evidence shows that Bolio did have authority to contract with Dow for the lumbering of all this timber, and that he also had authority to sell Dow all the standing timber covered by said contract except that on section 31. There was also evidence that Dow bought the timber believing Bolio had authority to sell it. The legal rule applicable to this case is correctly stated by Mr. Mechem in his work on Agency (section 283) as follows: "The principal is bound to third persons who have relied thereon in good faith and in ignorance of

any limitations or restrictions by the apparent authority he has given to the agent, and not by the actual or express authority where that differs from the apparent; and this, too, whether the agency be a general or a special one." [24]

Under this rule it cannot be said that Bolio did not have verbal authority to make the contract in question. The court charged, in effect, that the jury might find that plaintiff ratified the action of its agent, Bolio. Plaintiff contends that there was no evidence justifying this charge. If so, the charge was not erroneous, because it bore only upon the question of Bolio's authority, and under the rule we have just stated the undisputed testimony established that authority. * * * Affirmed.

JOHNSTON v. MILWAUKEE & W. INV. CO.

(Supreme Court of Nebraska, 1895. 46 Neb. 480, 64 N. W. 1100.)

Replevin. Judgment for plaintiff, and defendant brings error.

IRVINE, C.[25] This was an action of replevin for 250 head of cattle by the defendant in error against the plaintiffs in error. On the first trial there was a verdict and judgment in favor of the defendants in the district court. This judgment was reversed by this court. Investment Co. v. Johnston, 35 Neb. 554, 53 N. W. 475. The case has been retried, resulting in a verdict and judgment for the plaintiff, and the defendants now prosecute error. * * *

On the trial in the district court a special verdict was taken, whereby, under instructions conformable to the former opinion, the jury found that no such custom prevailed. The jury also found that, prior to the sale of the cattle in question, Adams had not, with the plaintiff's knowledge, performed any similar acts, and under a peremptory instruction there was a finding that Adams possessed no actual authority to make the sale. There were other findings, not material to the questions which we shall consider. The former opinion strongly implied a holding that no actual authority existed for the sale made by Adams, and we shall not here reconsider that question. The judgment in favor of the plaintiff was evidently entered on the theory that, in the absence of such actual authority, or apparent, conferred either by a custom of business or by the exercise of prior similar acts, the plaintiff could not be bound by Adams' acts.

One instruction given by the court clearly shows that the judgment proceeded on this theory. This instruction was as follows: "An act

[24] See Bentley v. Doggett, 51 Wis. 224, 8 N. W. 155, 37 Am. Rep. 827 (1881), quoting Story on Agency, § 127. "The principal is bound by all the acts of his agent within the scope of the authority which he holds him out to the world to possess." Baker v. K. C., S. J. & C. B. Ry. Co., 91 Mo. 152, 3 S. W. 486 (1887).

[25] Part of the opinion is omitted.

is within the apparent authority of the agent when it is of like character as that of prior acts performed by him for the same principal, and which such principal, knowing the same, sanctioned or ratified. The act of an agent within his apparent, but not within his real, authority, will bind his principal only in case the person dealing with such agent knew of such prior acts, and dealt with the agent in reliance thereon; and in this case you are instructed that, unless you find from a preponderance of the evidence that Thomas R. Adams had, prior to the sale of these cattle, performed acts of a similar character, and that the plaintiff, after knowledge or notice thereof, sanctioned or ratified such prior similar acts, then you will not be justified in finding that Adams possessed the apparent authority to sell the cattle in question. The defendants cannot base any rights in this action upon the ground that they dealt with Thomas R. Adams as having the apparent authority to sell the cattle, unless it appears from the evidence that they, or one of them, knew of facts giving such apparent authority to Adams, and acted upon such appearances in the transaction of purchasing the cattle in question. The mere fact that the plaintiff had intrusted the care, management, and possession of these cattle to Thomas R. Adams gave him no authority to sell them. Although authority on the part of an agent may, in proper cases, be implied from the words and conduct of the parties, or from the circumstances of the case, yet the extent of the authority so implied cannot exceed the necessary and legitimate effect of the facts from which it is inferred, but must be limited to the performance of like acts under like circumstances. The authority, if implied at all, can only be implied from facts."

In the light of all the instructions it was clearly the view of the court that, having disposed of the question of actual authority, and the jury having found that no such general custom existed as would, under the former opinion of the court, confer authority upon the agent, no apparent authority could exist, unless by the exercise by the agent of such authority in the past, supplemented by knowledge of those acts on the part of the company, and by similar knowledge on the part of defendants, relied on by them in making the purchase. It is familiar law that a principal is bound by the acts of his agent not only when performed within the scope of his actual or implied authority, but when within the scope of apparent authority conferred upon him by the principal. There have been many cases distinguishing in this respect between a general agent and a special agent, and perhaps this distinction is not without value, although in most cases it simply throws back one step the process of investigation. Indeed, with regard to acts of corporations, it has often been said that the only general agents are its directors, acting in their corporate capacity. Strict application of the distinction would therefore constitute all acts of corporations not performed under a resolution of the board of directors the acts of special agents, and would require all persons deal-

ing with corporations, except in pursuance of such resolutions, to proceed at their peril.

This, at one stage of the law, might have been a proper doctrine. But the courts must take notice of the fact that the province of corporations is now vastly enlarged; that corporations now exist, not only for the transaction of public or ecclesiastical affairs, but for the purpose of carrying on ordinary business transactions. We have now private corporations not only operating railroads and other institutions having quasi public functions, but also corporations conducting banks, manufacturing establishments, live-stock raising, as in the present instance, and even retail shops. The domain of individual enterprise has, in other words, been invaded by corporations; and in the conduct of such enterprises we can see no reason and no principle of law requiring the application of rules to such corporations different from those applying to individuals under similar circumstances, except where the acts relate to the operations of the corporation in its capacity as such. What we mean to express by this is that in transactions having no relation to the corporation in its corporate capacity, but solely in regard to the conduct of its business affairs, the general principles applicable to individuals should apply. * * *

The sale of these cattle was clearly within the power of the corporation. The only question was the apparent authority of this particular agent of the corporation to make the sale; and we may thus divest ourselves in the present inquiry of all investigation as to corporate functions, and consider whether or not there was error in the judgment, independent of the fact that the plaintiff is a corporation. A review of the authorities bearing on the question would be almost endless, and their confusion is such that it would hardly be profitable. We conceive that the rule whereby a principal is bound by the acts of his agent beyond his actual authority, but within its apparent scope, is founded, in the first place, on the maxim that, where one of two innocent persons must suffer, it should be that one who misled the other into the contract (Story, Ag. § 443), and this doctrine is founded on a broad principle of equitable estoppel or estoppel in pais. We conceive that a proper statement of it with reference to such a case as we have before us is as follows: That where a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform on behalf of his principal a particular act, such particular act having been performed, the principal is estopped, as against such innocent third person, from denying the agent's authority to perform it.

We do not think that, in order to bring a case within this principle, it is in all cases necessary to show that by general custom, as defined in the former opinion of the court, such agents have such authority. Nor do we think that it is necessary in all cases to show that the

same agent had previously performed similar acts; that such acts were known to the principal; that the third person also knew of them, and relied on them in the transaction; or even that similar agents had in the past performed such acts. A number of elements may influence the solution of the question. In this case the corporation was located in Milwaukee, in the state of Wisconsin. It was formed for the purpose of doing business in Wyoming, and most of its business was there conducted. The very fact that the corporation and its general officers held their office at a remote point was an element for consideration. Rathbun v. Snow, supra [123 N. Y. 343, 25 N. E. 379, 10 L. R. A. 355]. One might be justified in dealing with a person in apparent management of the business in Wyoming, where the office of the corporation was in a distant state, where he would not be so justified if he found the general offices and general officers of the corporation at or near the place where the business was conducted. Furthermore, the general nature of the business and its requirements were elements for consideration. Furniture Co. v. Hardaway, 104 Ala. 100, 16 South. 29. It might well be that one would be justified in buying ripe fruit from one found in charge of orchards where he might not be justified in dealing with such a person in goods not perishable in their nature. Business usage might have its influence, although not so general and uniform, as by implying notice to the principal to also apply that such custom was in view when the agent was appointed.

We mention these instances merely by way of illustration, and we hold that the apparent authority of the agent beyond his actual authority does not depend solely upon custom or solely on the performance of previous similar acts, whether known or unknown to a person dealing with him; but that, subject to the general rule we have above stated, and to general legal principles, the question is one of fact, to be determined by the jury under all the circumstances of the transaction and the business as disclosed by the evidence.

It follows that the special findings referred to were insufficient whereon to found the judgment, and that the instruction quoted was erroneous. Reversed and remanded.[26]

[26] Followed in Harrison Nat. Bank v. Austin, 65 Neb. 632, 91 N. W. 540, 59 L. R. A. 294, 101 Am. St. Rep. 639 (1902); Same v. Williams, 2 Neb. (Unof.) 400, 89 N. W. 245 (1902); Thomson v. Shelton, 49 Neb. 644, 68 N. W. 1055 (1896). In St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. App. 270, 90 S. W. 737 (1905), ante, p. 155, apparent authority is defined as "such authority as a reasonably prudent man, using diligence and discretion, in view of the principal's conduct, would naturally suppose the agent to possess. Much of the apparent authority of an agent, whether asserted as incidental, or on usage, or on the agent's previous course of dealing rests on the principles of the doctrine of estoppel. The question is rather what the third person had the right to believe concerning the agent's powers, than what powers the principal intended to confer." See, also, Smith v. McGuire, 3 H. & N. 554, 27 L. T. Exch. 465, 6 W. R. 726 (1858).

KEITH v. HERSCHBERG OPTICAL CO.

(Supreme Court of Arkansas, 1886. 48 Ark. 138, 2 S. W. 777.)

Action for $51.75 on open account for goods sold by plaintiff's traveling agent. Defense that agent agreed not to sell to any one else in the same town, and that he sold to two others on the same agreement. On learning this, defendant refused to take the goods, and notified the plaintiff. Trial and judgment for plaintiff.

SMITH, J.[27] * * * The jury were told, in substance, to disregard all testimony as to the agreement not to sell to any other parties unless it was shown that the agent was a general agent, or had authority from plaintiff to make such contract. And the court rejected prayers to the effect that if plaintiff's agents agreed not to sell the same class of goods to any person in Booneville, and this was an inducement moving defendant to make the purchase, and that plaintiff's agent violated this agreement and sold to other parties, this was a fraud on defendant, entitling him to rescind the contract; also, that a principal claiming the benefit of a contract made by his agent is bound by the terms of such contract, unless the other had notice of the want of authority in the agent.

A special agency exists when there is a delegation of authority to do a single act. A general agency is where there is a delegation to do all acts connected with a particular business or employment. Now, A. Hirschberg, so far as the defendant knew, had a general authority to sell the plaintiff's goods; his agency not being limited to any particular mode of doing it. In reality, as the proof discloses, his authority, although it extended to do acts generally in the course of his employment, was yet qualified and restrained by instructions of a special nature. But these instructions had never been communicated to the defendant. The rule in such a case is the agent is deemed, as to the persons dealing with him in ignorance of such special limitations, conditions, and instructions, to be a general agent, although, as between himself and his principal, he may be only a special agent. In other words, a general agency does not import an unqualified authority, but that which is derived from a multitude of instances or in the general course of an employment or business. And the principal will be bound by the acts of his agent within the scope of the general authority conferred on him, although he violates by those acts his private directions, which are given to him by his principal, limiting, qualifying, suspending, or prohibiting the exercise of such authority under particular circumstances.[28] A third person

[27] Part of the opinion is omitted.

[28] If the agent has apparent authority, third persons dealing with him are equally protected, whether in point of fact he had authority or not. They cannot be affected by private understandings between the parties. McAlpin v. Ziller, 17 Tex. 508 (1856), Trickett v. Tomlinson, 13 C. B. (N. S.) 663, 7 L.

has a right to assume, without notice to the contrary, that the traveling salesman of a wholesale house has an unqualified authority to act for the firm he represents in all matters which come within the scope of that employment. Smith, Merc. Law (3d Ed.) 173; Story, Ag. (8th Ed.) §§ 17–19, 126, 127; Paley, Ag. (4th Am. Ed.) *199 et seq., and notes; 2 Kent, Comm. (12th Ed.) *620; Brooks v. Perry, 23 Ark. 32; Leake v. Sutherland, 25 Ark. 219; Jacobson v. Poindexter, 42 Ark. 97; Meyer v. Stone, 46 Ark. 210, 55 Am. Rep. 577; Butler v. Maples, 9 Wall. 766, 19 L. Ed. 822; Insurance Co. v. Wilkinson, 13 Wall. 222, 20 L. Ed. 617; Insurance Co. v. McCain, 96 U. S. 84, 24 L. Ed. 653; Bryant v. Moore, 26 Me. 84, 45 Am. Dec. 96. Thus, in Minter v. Pacific R. R., 41 Mo. 503, 97 Am. Dec. 288, the baggage master was, by the printed rules of a railroad company, forbidden to take articles of merchandise on passenger trains. He nevertheless took a carpet, the passenger not knowing the rule, and the company was held liable for its loss.

The true question for the jury, then, was not whether A. Hirschberg had real authority, but whether he had apparent authority, to make the contract he did make. It follows that the charge of the court on this subject was wrong.

A contract which restrains the business or industrial freedom of a person within reasonable limits is not against public policy. Thus a covenant to sell patent teeth to no other dentist in a certain town of Vermont was held valid in Clark v. Crosby, 37 Vt. 188, and so a covenant not to sell any furniture in his line to any in the town of O. but B. Roller v. Ott, 14 Kan. 609. See Greenh. Pub. Pol. rule 565.

In 19 Amer. Law Rev. 962, it is stated that the supreme court of Texas, in Watkins v. Morley, had decided, in September, 1885, that a contract by a drummer not to sell a certain class of goods to any other merchant in a town except A., is within the apparent scope of his authority, and is binding on his principal. But we have not seen the full report of that case.

"The general rule is, as to all contracts including sales, that the agent is authorized to do whatever is usual to carry out the object of his agency; and it is a question for the jury to determine what is usual. If, in the sale of the goods confided to him, it is usual in the market to give a warranty, the agent may give that warranty in order to effect a sale." Benj. Sales (4th Am. Ed.) § 624, and cases cited; Le Roy v. Beard, 8 How. 451, 12 L. Ed. 1151; Schuchardt v. Allens, 1 Wall. 359, 17 L. Ed. 642; Talmage v. Bierhause, 103 Ind. 270, 2 N. E. 716; Smilie v. Hobbs, 64 N. H. 75, 5 Atl. 711.

T. 678, 106 E. C. L. 663 (1863). A principal is equally bound by the authority which he actually gives, and by that which by his own act he appears to give. Osborne & Co. v. Gatewood (Tex. Civ. App.) 74 S. W. 72 (1903). This is so, equally, whether he is a general or a special agent (Lister v. Allen, 31 Md. 543, 100 Am. Dec. 78 [1869]), though a general agency allows more latitude than a special (Wilcox v. Routh, 17 Miss. 476 [1848]).

The rejected prayers set out above should also have been given. When an agent for the sale of property is acting upon the line of business committed to him, his principal is chargeable with the false representations made by him. Strayhorn v. Giles, 22 Ark. 517; Morton v. Scull, 23 Ark. 289; Matlock v. Reppy, 47 Ark. 148, 14 S. W. 546. The plaintiff cannot recover the price of the goods without performing the condition upon which the sale was made.

Reversed, and a new trial ordered.

PATTERSON v. NEAL.

(Supreme Court of Alabama, 1902. 135 Ala. 477, 33 South. 39.)

Appeal from judgment of $1,500 for plaintiff, on the ground that the court refused to charge: "If the jury believe the evidence they must find for the defendant."

DOWDELL, J. While the complaint in this case, as originally filed and afterwards amended, contained a number of counts, the cause was tried alone on the seventh count. No questions are raised on the pleadings. By the seventh count the plaintiff claims for the death of his minor son, a boy 16 years of age, who was killed by falling rock while he was digging coal in the defendant's mine. The complaint avers a wrongful employment of plaintiff's minor son by the defendant, in that he was so employed to dig coal without the knowledge and consent of the plaintiff, his father. It is not charged that the death was caused by any negligence on the part of the defendant or his agents, but the right of action is rested upon the wrongful employment as alleged in the complaint.

On the trial the undisputed evidence showed: That Matthew Neal, the minor son of the plaintiff, was killed by falling rock, while engaged in mining coal in one of the several mines operated by the defendant. Matthew had been employed by the defendant, with the knowledge and consent of the plaintiff, as a driver in the mine; and, three days before the accident, Matthew exchanged places with his brother, who was employed as a coal digger in the mine,—Matthew taking the place of his brother as a coal digger, and the brother the place of Matthew as a driver,—and pending this exchange of places and work between the two brothers the accident resulting in the death of Matthew occurred. The defendant, Patterson, was at the time the owner and operator of several coal mines, including the one in question. Clark was the general superintendent of the defendant's mining business. Winters was an assistant under Clark, and was the mine boss of the mine in question. Clark alone, as superintendent, was given authority by the defendant to employ coal diggers in the mines. Winters had no such authority given him. That his authority and duty was to boss and direct the miners, and the opera-

tions in the mines. That sometimes persons would apply to him for employment as coal diggers, and that whenever such was the case he would report the application for employment to Clark, who would approve or disapprove, and that he never employed any one to dig coal without having first obtained the approval and consent of Clark. That whenever Clark employed a coal digger for the mine in question, he sent such person to Winters, who assigned the coal digger to his place of labor in the mine, and that, whenever Clark approved the application of one seeking employment through Winters, upon such approval or consent by Clark he (Winters) would then make the employment, and assign such applicant to a place in the mine to dig coal. It is not pretended that either the defendant or Clark, his general superintendent, employed Matthew to dig coal in the mine, or that either of them had any actual knowledge that he was engaged in that work. Neither is it pretended that there was any express employment of Matthew to dig coal in the mine by Winters.

The first contention is that there was an implied contract of employment with Matthew by Winters, and, furthermore, that Winters had implied authority to employ, by reason of the principal's acquiescence in previous acts of employment of coal diggers by Winters. And the second contention of the plaintiff is that Winters had apparent authority to give employment to dig coal in the mine. These contentions are based upon the following state of the evidence in the record: Winters was the boss of the mine, and superintended the laborers and the work in the mine. Two or three witnesses for the plaintiff testified that on several occasions Winters gave employment to persons seeking work in the mines as coal diggers, and assigned them to their places and work, but also stated that they did not know and could not say whether he (Winters), in said instances, had the previous approval and consent of the defendant or of the general superintendent, Clark, to give the employment to said persons. In this connection the testimony of Winters was that he had never given employment to any person whatever, to dig coal, without having first reported the application of such person to Clark, and getting his approval and consent to give the employment, and, when such consent was obtained, he would then assign the applicant to his place and work in the mine. And the testimony of Clark was that he never knew of Winters having given employment to any person to dig coal in the mine, without having first obtained his (Clark's) approval and consent to employ the person.

We do not think, upon the question of implied authority, growing out of a knowledge of and acquiescence in the acts of the agent by the principal, there is any material conflict in the evidence. The facts testified to by plaintiff's witnesses as to the employment of persons to dig coal by Winters are entirely consistent with the further fact that he had no authority to employ, and that in the given instances the employment came from Clark. Winters' acts and conduct in

this respect not being in excess of or inconsistent with authority and duties of his agency, they are not such as that a knowledge of them by the principal would raise up an implied authority in him to employ coal diggers. We are quite clear that the evidence as to Winters' want of authority, express or implied, to employ persons to dig coal in the mine, is free from any conflict. It is true that there was also evidence on the part of the plaintiff tending to show that, on the day of the exchange of places between the two brothers—Matthew going into the mine to dig coal—Winters, being informed of the swap, made no objection, and, furthermore, that Winters knew that Matthew was digging coal from that time on until the accident, which happened three days later, and made no objection to it. This, without knowledge on the part of the defendant or his superintendent, Clark, was of itself insufficient to afford any inference of ratification of Winters' conduct, or to show any implied authority in Winters to employ Matthew, or to assent to his changing places with his brother.

As to the second contention—that Winters was clothed with apparent authority to contract for his principal with persons to dig coal in the mine—it is clear that the case is not one where the doctrine of apparent authority has any application. This principle of the law operates by way of estoppel, and to prevent the practice of fraud. If the plaintiff had contracted with Winters for the employment of his (plaintiff's) son to mine coal, and was suing for his son's wages, and the defendant should deny the authority of Winters, as agent, to make the contract, the doctrine of apparent authority might be invoked. The doctrine of apparent authority can be invoked only by one who has been misled to his detriment by the appearance of authority in an agent with whom he deals, though not existing in fact. The principal is liable for the agent's act within the scope of his actual authority, because it is his own act, and is liable for the agent's act within the scope of the apparent authority which he holds the agent out as having, but which in fact he has not, because to dispute the existence of such apparent authority would enable the principal to commit a fraud on innocent third persons relying on such appearance. 1 Am. & Eng. Enc. Law (2d Ed.) p. 990. The principal may not hold out his agent to the world as possessing authority, and escape liability from his acts in dealing with innocent third persons within the scope of the agency, by secret limitations upon his authority. But if the party dealing with the agent does not rely upon his apparent authority, the principal will not be bound by the unauthorized acts, which are apparently, but not actually, within the scope of the agent's authority. Tallmadge v. Lounsbury, 50 N. Y. St. Rep. 531, 21 N. Y. Supp. 908.

It is clear that the plaintiff here did not rely or act upon any apparent authority in the agent. The boy was not induced to dig coal by an appearance of authority in Winters, for the undisputed

evidence shows that he began to dig coal without ever having consulted Winters. We are unable to see how the doctrine of apparent authority can have any application. It cannot be pretended that either the plaintiff or his son was misled by dealing with the agent under the appearance of authority. The authorities cited in the brief of appellee on this question are all cases where the agent, within the scope of his agency, dealt with persons relying upon his apparent authority, and lay down the doctrine we have stated above. Not one of these cases is analogous in the facts to the one before us.

Our conclusion is that, on the law and the undisputed evidence in this case, the defendant was entitled to the general charge as requested, and the trial court erred in its refusal. The view we have taken of the case, we think, renders it unnecessary to notice other assignments of error. Reversed and remanded.[29]

II. LIMITATIONS

VAN EPPES v. SMITH.

(Supreme Court of Alabama, 1852. 21 Ala. 317.)

Smith sues for $23 for putting up an awning in front of defendant's stable. The work was ordered by an employé of the defendant, who attended to letting out horses and carriages for hire, and who nightly turned over the collections to defendant's agent, Austin.

LIGON, J.† The motion to dismiss the writ of certiorari, because the reasons set forth in the petition for it were not sufficient to authorize its issue, was correctly overruled by the court below. The statute which allows appeals and writs of certiorari to judgments rendered by justices of the peace, declares, that when such cases reach the appellate court, they shall be tried de novo on their merits, upon issues made up under the direction of the court, thus indirectly forbidding their dismissal for any irregularities in the manner of bringing them before that court.

On the trial, it appears by the bill of exceptions, the court charged the jury, "that a person may have several agents, with full powers to do the same act, and if the plaintiff had ground sufficient to satisfy an ordinarily reasonable man of the agency of Stall, and that he had performed the work and delivered it, before he was informed to the contrary, it would be sufficient to charge the defendant." This, as a proposition of law, cannot be supported. The inferences of a party dealing with one whom he supposes to be the agent of another, deduced alone from the acts of such supposed agent, are no proof of

[29] St. Louis Gunning Adv. Co. v. Wanamaker, 115 Mo. App. 270, 90 S. W. 737 (1905), ante, p. 155.

† Part of the opinion is omitted.

agency, and the jury should not be told to look to them as such.[30] In Scarborough v. Reynolds, 12 Ala. 253, it is held, "that the agency of a party must first be proved by other evidence than his acts, before it can be assumed that his acts are binding on the principal." Some act of the principal, in relation to the thing done, is indispensable to make out the agency, and the pretensions and acts of the party assuming to be the agent have no foundation upon which to rest, until the principal is thus connected with them.

The text books lay it down as a rule in such cases, and this court has repeatedly reiterated it, that, when a person deals with one who professes to be the agent of another, the person contracting with him is bound to know the extent of his authority. Paley on Agency, 309; Fisher v. Campbell, 9 Port. 210; Gullett v. Lewis, 3 Stew. 23. But the last part of the charge in this case assumes the law to be, that if a party deal with one whom he reasonably supposes to be the agent of another, the contract is binding on the latter, unless he informs the dealer before the contract is completed that the professed or supposed agency does not exist. This is manifestly erroneous, and based upon a misconception of the law; for under it the burden of proof is thrown on the defendant, and he is required to prove the want of authority of him who unauthorizedly intermeddles in his business; when by the rules of law, it is on the plaintiff to show the fact of agency. * * *

For the error shown above, let the judgment be reversed and the cause remanded.

FIGUEIRA v. LERNER.

(Supreme Court of New York, Appellate Division, Second Department, 1900. 52 App. Div. 216, 65 N. Y. Supp. 293.)

WOODWARD, J. This is a proceeding, brought under the provisions of subdivision 4 of section 2232 of the Code of Civil Procedure, to oust the occupant of certain premises in the borough of Brooklyn, on the ground that said occupant had intruded into said premises without permission of the owner, and that the occupancy thus commenced had continued without such permission. The occupancy was admitted by the answer, but it was urged that it was with the permission of the

[30] Presenting oneself as agent, and making declaration to that effect, create no valid apparent authority. Tompkins Mach. Co. v. Peter, 84 Tex. 627, 19 S. W. 860 (1892). Agents cannot empower themselves to act. Crawford v. Whittaker, 42 W. Va. 430, 26 S. E. 516 (1896); Edwards v. Dooley, 120 N. Y. 540, 24 N. E. 827 (1890). The apparent authority is that which he appears to have from that which he actually does have, and not from that which he may pretend to have, or from his actions on occasions which were unknown to and unratified by his principal. Oberne v. Burke, 30 Neb. 581, 46 N. W. 838 (1890), containing a valuable discussion. There is a distinction between the apparent powers and the acts apparently, but not really, within the power. Mechanics' Bank v. N. Y. & N. H. Ry. Co., 13 N. Y. 599 (1856).

owner, given by one Marks, acting as agent for the owner. The learned justice, upon the trial of the issue thus raised, determined the matter in favor of the owner of the premises, and an appeal from the order entered upon this decision comes to this court.

We are asked to reverse the order upon the ground that the weight of evidence preponderates in favor of the appellant, that the final order is against the evidence, and that it is contrary to law; but an examination of the record does not warrant this relief. The question presented was whether Marks was in fact the agent of the owner of the premises, with authority to rent and give possession to the appellant. Upon this point there was a direct conflict of evidence, and, the learned justice having decided in favor of the owner of the premises, it is not for this court to disturb this conclusion. Fowler v. Marcus, 41 App. Div. 425, 58 N. Y. Supp. 867. The evidence clearly warrants the decision; for there is practically no dispute that Marks was merely authorized to bring a tenant to the owner of the premises, or to his general agent, and to receive a commission for such work. As to whether this authority was extended at a subsequent interview with the owner in respect to the renting of the premises to the defendant, the evidence is conflicting, and the justice before whom the question was tried has found in favor of the petitioner.

While a principal is bound by his agent's acts when he justifies a party dealing with his agent in believing that he has given to the agent authority to do those acts, he is responsible only for that appearance of authority which is caused by himself, and not for that appearance of conformity to the authority which is caused only by the agent; that is, he is bound equally by the authority he actually gives, and by that which by his acts he appears to give. For the appearance of authority he is responsible only so far as he has caused that appearance. For the appearance of the act the agent alone is responsible. The fundamental proposition is that one man can be bound only by the authorized acts of another.[31] He cannot be charged because another holds a commission from him, and falsely asserts that his acts are within it. Edwards v. Dooley, 120 N. Y. 540, 24 N. E. 827. The limited scope of Marks' agency was indicated to the defendant when he announced that he must see the owner of the premises before renting the same, and if the owner did not extend the authority, and did not do any acts from which the defendant would be justified in believing that the powers of Marks had been extended, the defendant did not come into the possession of the premises with the consent of the owner, and the order appealed from should be affirmed.

The decision of the justice below, upon the conflict of evidence in respect to this point, must, as we have already indicated, be conclusive. The order appealed from should be affirmed, with costs. All concur.

[31] Accord: Leary v. Albany Brewing Co., 77 App. Div. 6, 79 N. Y. Supp. 130 (1902); Wright v. Glyn, [1902] 1 K. B. 745, 71 L. J. K. B. 497, 86 L. T. 373, 50 W. R. 402.

SECTION 4.—EXPRESS AND IMPLIED AUTHORITY

FARMERS' & MECHANICS' BANK v. BUTCHERS' & DROVERS' BANK.

(Court of Appeals of New York, 1857. 16 N. Y. 125, 69 Am. Dec. 678.)

Action by a holder for value of three checks for $1,000 each, and two for $1,500 each, for the face of the checks. They had all been certified as good by defendant's paying teller, who had full authority to certify checks when the drawer had sufficient funds in the bank, but who was instructed not to certify when there were not sufficient funds on deposit. Green, the drawer of these checks, induced the teller to certify when there were no funds by telling him he wanted them for temporary use, and they should not become a charge upon the bank.

COMSTOCK, J. (dissenting).[32] * * * The question I now propose to examine is whether the teller had power to enter into these contracts as the agent of the defendants. In the first and most obvious view of an agency of any description, the principal is bound by such acts as he has authorized, and no others.[33] In a just sense, this is

[32] Part of the dissenting opinion is omitted. The majority opinion [here omitted] held the bank not liable on the ground that there was a distinction between the terms of a power and facts entirely extraneous, upon which the right to exercise the authority conferred may depend. One dealing with the agent is bound to know the extent of the power, but not these extrinsic facts, such as whether the drawer had funds.

[33] The authority of an agent may be shown, either directly by express words of appointment, either spoken or written, or it may be implied or indirectly shown, by evidence of the relative situation of the parties, the nature of the business and the character of the intercourse between the parties justifying such an inference. Acts and doings are often quite as significant as words spoken. Geylin v. De Villerol, 2 Houst. 311 (1860), ante, p. in which the court instructed the jury: "But, although it is perfectly true as a general rule, as stated by the counsel for the defendant, that the agent must not exceed the general scope of his authority, yet it is equally true that the extent or scope of the authority conferred on the agent depends upon the nature and character of the business to be done or transacted, and it is (unless a contrary intention manifestly appears) always construed to include all the necessary means of executing it with effect. And not only are the means necessary and proper for the accomplishment of the end proposed included in the authority, but also all the various means and methods which are justified, or allowed, in that particular trade or business. The scope of the authority must be measured by the nature, requirements and necessities of the thing to be done and accomplished. The agency may be either general, or special and limited. A general agent is, first, a person authorized by his principal to transact all his business of a particular kind, or he is a person who, being engaged in a certain trade or business, is employed by his principal to do certain acts or things for him in the course of that trade or business. In both of these cases the agent will, if there be no limitation of his authority known to these parties, be taken as to them to be a general agent, and will therefore have the power to bind his principal by all con-

universally and necessarily true, because the proposition is involved in the very idea of agency. If there are apparent exceptions in the books, they are not such in fact, but are merely varieties in the application of the rule, which do not contradict the rule itself. This will appear when we consider the modes in which powers are derived from a principal to an agent so as to bind the former in favor of third parties.

An agency may be constituted by writing. When this is the case, the agent takes precisely such authority as the instrument confers, upon a fair construction of the language used, taken in connection with the general or particular purpose of the power. An authority thus derived of course includes, in the absence of special restrictions, all such incidental powers and means as are necessary in the execution of the main purpose. The agency may also be created by a special verbal appointment. I use the word special, not with reference to the powers to be exercised, but to the mode of creating them by special or express words. When the language of such an appointment is once ascertained, it is perfectly obvious that the authority of the agent is precisely what it would be if it were conferred by a writing in the same language.

But there is another, and, for all purposes connected with the present inquiry, only one other, mode of delegating power. Without any express or special appointment, an implied agency may arise from the conduct of a party. Story on Agency, § 54. Where a person has recognized a course of dealing for him by another, or a series of acts of a particular kind, an implied agency is thereby constituted to carry on the same dealing or to do acts of the same character. Now, the only difference between such an agency and those which are created by express appointment, whether verbal or in writing, is that the latter may, by the very terms of the power, be confined to a single transaction or act, while the very existence of the former is derived from a course of recognized dealing or a series of recognized acts. This implied agency is therefore never a special one, in the sense in which that term has generally been used. All express agencies may or may not be special, according as they authorize, or do not, more than a single act.

Although much has been said concerning general and special agencies, there never was any other intelligible distinction indicated by those terms. Where this distinction does not exist, in other words, where the power is not special in this sense, agencies by express appointment

tracts entered into with such third parties, which are within the scope of his ordinary employment. The duty, therefore, of determining the extent to which the principal has accredited his agent, is devolved on the jury; and if they are satisfied that the principal by his conduct, words, or acts warranted the agent to hold himself out to the world as possessing certain authority in that respect, he, the principal, will be bound by the exercise of that authority, whether the agent really possessed it or not." The plaintiff had a verdict.

and those implied from conduct are entirely similar in all their characteristics and incidents. In the one class, the authority is manifested by an express delegation; in the other, it is presumed or implied from the conduct of the principal. This presumption is allowed even against the real facts of the case, where the rights of bona fide dealers are concerned. In all this class, it is presumed that the principal has actually delegated power to do the acts which he has been in the habit of recognizing and approving. The power thus presumed is to be judged in all respects as though the delegation were actually shown. It will justify and uphold acts of the same kind, or, in other words, within the presumed authority, but no others.

I have observed that there may be seeming contradictions of the fundamental doctrine, that a principal is bound only by such acts of his agent as he has duly authorized. This presumptive or implied agency is one of these, because a man may have accepted and approved acts which he never authorized, and so be bound, as to third persons, by similar acts. Another and the only other of these apparent contradictions is where the acts done by the agent are justified, as to innocent dealers, by the authority, whether conferred by express delegation or presumed in the manner indicated, but are opposed to special private restrictions. In such cases the liability of the principal rests upon a just distinction between the power conferred and private instructions as to its exercise. But the power must in all cases be vested either actually or presumptively, and if it be not, the principal cannot be charged.

The principles, so far stated, are simple and elementary, although they have been somewhat obscured by loose and indeterminate expressions in the books. Applying them to the present inquiry, it becomes plainly of no importance whether the power of Mr. Peck, the defendants' teller, to certify checks, was derived from a special appointment or from a recognition of his acts. At the circuit it appears to have been placed on the ground of recognition, and no special appointment was shown. The difference is merely in the mode of constituting the agency. The power in either case is the same. Viewing it as derived or implied from acts recognized and approved, the inquiry at the circuit should have been, what were those acts? If they were confined to the certification of checks drawn upon actual deposits, then the power to be implied or presumed was to do acts of the same character, but not of a character wholly different, although clothed in the same form.

In a word, the certifying authority of the teller is to be construed and treated in all respects as though it had been given to him by a written instrument specially defining and restricting it; and viewing the authority in this manner, we are to inquire whether, under a power expressly confined to the certification of checks drawn upon sufficient funds on deposit with the defendants, the teller could

bind them by certificates which were fictitious and false. These certificates, as we have seen, are to be regarded as acceptances; and another mode of stating the inquiry therefore is, could the teller, with authority only to accept checks drawn upon actual funds, bind his principals, by accepting for the accommodation of the drawer, when there were no funds on deposit and none in expectancy?

This question, it is proper now to observe, cannot be determined in the plaintiffs' favor on the ground that the limitations upon the agent's power were in the nature of private instructions merely, in regard to its exercise. The difficulty which meets us in this view of the case is that the power exercised is not embraced at all in the commission. An authority to accept drafts, in the regular business of the principal, upon funds of the drawer, is a precise and well defined authority. It cannot, in my opinion, include acceptances out of the principal's business, and for the accommodation of third persons. So, an authority to accept or certify checks, in the regular course of banking business, would seem to be equally definite. It does not embrace a power to pledge the responsibility of the bank for the accommodation of persons who are not depositors and have no funds.

It is urged that the teller is a proper agent or officer to answer questions and give information as to the funds of a person who draws his check. But this is a very different thing from entering into a written engagement which operates to transfer the fund, if there be any, from the depositor, and which, whether there be any funds or not, imposes a pecuniary obligation on the bank, to last until barred by the general statute of limitations. It ought not to be contended seriously that such a power can be derived from the simple practice in a bank of turning to its books and communicating to inquirers, through the teller or book-keeper, the condition of its customers' accounts. * * *

CLAFLIN v. CONTINENTAL JERSEY WORKS.

(Supreme Court of Georgia, 1890. 85 Ga. 27, 11 S. E. 721.)

One Weisbein, a merchant in Savannah, by fraudulent representations as to his solvency, secured large amounts of goods from Claflin & Co. and Jaffray & Co. By a heavy sale he secured $60,000 in cash, with which he absconded. He left his manager, Lichtenstein, in charge under a written power of attorney to manage the business, and make collections, pay bills, and do any acts necessary and proper for carrying on the business, as fully as the principal might do if personally present. Claflin & Co. and Jaffray & Co. demanding pay, and Lichtenstein having no money, he offered to pay in goods, and turned over to them goods of sufficient amount to settle their accounts, a large part

of such goods being the same originally purchased from said firms and still unpaid for. The Continental Works and other creditors attacked this conveyance as a fraud upon the rest of the creditors, and outside the scope of Lichtenstein's authority. Appeal from a verdict and decree against defendants.

SIMMONS, J.[34] The errors assigned in the fifth to eighteenth (inclusive) grounds of the motion for a new trial go to the refusal of the court to give in charge to the jury certain principles of the law of agency which bear upon the question of the extent of Lichtenstein's authority. The requests may embody sound law, but it is immaterial whether they do or not. Where an agent's authority is conferred and defined in writing, the scope or extent of such authority is a question for determination by the court. Mechem, Ag. § 104; 1 Thomp. Trials, § 1370; Berwick v. Horsfall, 29 Law J. C. P. 193; Dobbins v. Manufacturing Co., 75 Ga. 238, 243; Pollock v. Cohen, 32 Ohio St. 514. As said by this court in the case above cited (page 243): "That it was the duty of the court to construe both the charter and the letter of attorney, and to determine the extent of power conferred by both and each of them upon the agent, we think, is a plain proposition. Taken alone, and without proof of other circumstances to which it was necessary to resort to clear ambiguities or to explain doubtful intention, there was nothing for the jury to find. The question was purely and simply one of law, to which it was the exclusive right and duty of the judge to respond."

In requesting charges upon the extent and nature of a general agency, there seems to have been an attempt by the plaintiffs in error to enlarge the authority of Lichtenstein beyond the limits of his power, or at least to establish the construction that the instrument created a general agency. If there was any such effort, the court did not err in defeating it. It is not allowable, by the adduction of extrinsic oral evidence, to add to the powers expressly given in the writing. The authority must be proved by the instrument itself. Neal v. Patten, 40 Ga. 363. The very purpose of a power of attorney is to prescribe and publish the limits within which the agent shall act, so as not to leave him to the uncertainty of memory, and those who deal with him to the risk of misrepresentation or misconception, as to the extent of his authority. To confer express authority is to withhold implied authority. There can be no parol enlargement of a written authority. Whart. Ag. § 225; Mechem, Ag. § 306; Reese v. Medlock, 27 Tex. 120, 84 Am. Dec. 611; Batty v. Carswell, 1 Amer. Lead. Cas. 687, notes; Pollock v. Cohen, 32 Ohio St. 514.

Besides, the power of attorney was relied upon throughout the whole transaction. The plaintiffs in error believed Lichtenstein's acts to be within the letter of his authority, having taken the advice of counsel in reference thereto, so that they cannot claim to have been misled by

[34] Part of the opinion is omitted.

any appearance of authority other than that which the writing gives.[35] * * *

The court found the act of Lichtenstein to be outside his authority, but the case was reversed on other grounds.

DUNWOODY v. SAUNDERS.

(Supreme Court of Florida, 1905. 50 Fla. 202, 39 South. 965.)

COCKRELL, J.[36] The plaintiffs in error, as plaintiffs below, sued for the loss and hire of a barge or lighter. The declaration consisted of three counts—the first an ordinary count in bailment for the loss through the alleged negligence of a bailee for hire; the second count alleged a special contract whereby the bailee became an insurer of the barge; and the third count was for the rental value of the lighter between the hiring and the loss. There was verdict and judgment on the last count alone, and to the judgment the plaintiffs sued out this writ of error.

No question is raised here on the pleadings, all assignments of error therein being expressly abandoned, and the only assignments, in view of the disposition of the case, that we shall consider, are those based upon certain instructions given, modified, or refused.

The barge was hired for the purpose of being towed from Pensacola to St. Andrews Bay and there receive on board a cargo of lumber, when it was to be towed back with such cargo to Pensacola by the defendant's tugboat, and there was evidence that the owners of the barge placed thereon a master, with direction to see to it that the barge was loaded in a certain way, and that this manner of loading caused its loss. * * *

The court erred in giving this charge: "If you find that Hyer had authority from the defendant to hire the barge Brainard for the trip from Pensacola to St. Andrews and return, yet the existence of such power would not authorize him to bind the defendant by a contract that the barge, during the possession of her under such hiring, should be at the risk of the defendant." The defendant in error asserts that this instruction "was intended to present boldly to the jury the assertion that there was no evidence to show that Hyer had the power, or that the plaintiffs had the right to rely on his having the power, to bind the defendant by a contract that the barge during bailment should

[35] See, also, Savage v. Pelton, 1 Colo. App. 148, 27 Pac. 948 (1891). One who deals with an agent acting under a written authority is to be regarded as dealing with the power before him, and must at his peril know that the act of the agent is one that is authorized by the power. Stainback v. Read, 11 Grat. 281, 62 Am. Dec. 648 (1854); Sandford v. Handy, 23 Wend. 260 (1840); Cummins v. Beaumont, 68 Ala. 204 (1880), ante, p. 291; Quay v. Presidio & Ferries Co., 82 Cal. 1, 22 Pac. 925 (1889).

[36] Part of the opinion is omitted.

be at defendant's risk." We shall accept this interpretation of the charge.

There was evidence from which we can legitimately infer that Hyer, who alone participated in the transaction on behalf of the bailee, was at the time acting as his general agent in the barge and towboat business, though Saunders had other lines of business not represented by Hyer, and, further, that subsequent to the loss of the barge when Hyer was charged with having made the contract, Saunders, though present, did not deny his authority. There was no proof of custom or usage or previous dealings, or that the bailors had knowledge of any limitations upon the agent's apparent authority. While a general agent's authority is confined to such transactions and concerns as are incident and appurtenant to the business of his principal, and to that branch of his business that is intrusted to his care, yet within these limits the principal is bound. Mechem on Agency, §§ 286, 287.

The same authority says: "Where the agent is authorized to transact all the principal's business of a certain kind, the very breadth of the employment and variety of the duties to be performed necessarily involve more or less of discretion and choice of methods, and render impracticable, if not impossible, much of particularity or precision, either as to the exact means and method to be employed, or as to the scope or extent of the authority itself. Where so little is expressed, more may well be implied. The fact of such an authority, of itself, presupposes a general confidence bestowed upon the agent, and a general committal to his discretion and judgment of all beyond the essential objects to be attained and the outlines of the course to be pursued. It may not unreasonably be presumed, where nothing is indicated to the contrary, that such an agent possesses those powers which are commensurate with his undertaking, and which are usually and properly exercised by other similar agents under like circumstances. This presumption may well be and is constantly relied upon by persons dealing with such agents, and so reasonable, proper, and necessary is this reliance, that it may justly be required that, if the principal would impose unusual restrictions upon the authority of such an agent, he should make them known to persons who may have occasion to deal with the agent."[87]

[87] Some independent judgment on the part of the agent is usually necessary. Hilliard v. Weeks, 173 Mass. 304, 53 N. E. 818 (1899). This is especially true where the agent's duties are not merely ministerial, capable of being defined and executed strictly, but involve large powers and wide discretion. Howard v. Baillie, 2 H. Bl. 618 (1796). If the principal, by his declarations or conduct, has justified the opinion that he had in fact given to the agent more extensive powers than those in the writing, then to that extent he will be bound by acts outside the express authority. Rawson v. Curtiss, 19 Ill. 456 (1858); Merchants' Ins. Co. v. New Mexico Lumber Co., 10 Colo. App. 223, 51 Pac. 174 (1897). A written power may be expanded by the declarations or acts of the principal. Philadelphia Trust, Safe Deposit & Ins. Co. v. Seventh Nat. Bank (D. C.) 6 Fed. 114 (1881). Cf. Mechanics' Bank v. Schaumburg, 38 Mo. 228 (1866). When the appointment has been expressly made in writing, it frequently happens that much of the agent's resulting

For the purpose of conducting this business over which he had general charge, should the circumstances arise, rendering such a course necessary, we see no limitation upon his power from the facts disclosed here, to buy a barge outright and bind his principal thereby. Much less are there limitations upon his power to buy the barge for the limited time required for the performance of this contract, since, as it may be gathered from the evidence, these were the only terms upon which he could secure it.

The question of the scope of the authority of an agent is generally one of fact, or of mixed law and fact, and therefore, under our system, that prohibits charges upon the facts, such question is best left to the determination of a jury under general instructions for its guidance. Other and different facts may be evidenced on another trial, and we refrain therefore from any further expression of our views.

It is unnecessary to discuss the form or effect of the verdict.

For the error pointed out, the judgment is reversed at the cost of the defendant in error and a new trial awarded.

REESE v. MEDLOCK.

(Supreme Court of Texas, 1863. 27 Tex. 120, 84 Am. Dec. 611.)

Action for the recovery of land and the cancellation of a deed executed by one Powers as agent for Reese, deceased. Verdict for defendant.

MOORE, J.[88] It is a well settled general principle that, when an agency is created and conferred by a written instrument, the nature and extent of the authority given by it must be ascertained from the instrument itself, and cannot be enlarged by parol evidence of the usage of other agents in like cases, for that would be to contradict or vary the terms of the written instrument. There may, however, be some qualifications and limitations properly belonging to this general rule, whereby, especially in cases of general or implied agencies, the usages of a particular trade or business, or of a particular class of persons, are properly admissible, not, indeed, for the purpose of enlarging the powers of the agents employed therein, but for the means of interpreting and rightly understanding those powers which are actually given. The power of attorney under which the agent sold the land in controversy to the defendant, Medlock, did not authorize him to barter or exchange it for other property. It cannot surely be seriously insisted that there has become such a general and uniform custom or usage of trade, by agents for the sale of land in this state,

authority is implied, because, even where acting under a minutely detailed power of attorney, some item is almost inevitably omitted in drawing the instrument. Adams Express Co. v. Byers (Ind.) 95 N. E. 513 (1911), quoting 31 Cyc. 1355.

[88] Part of the opinion is omitted.

in contravention to the legal import of the instrument under which they derive their authority, as to overturn and abrogate the well established rules of legal construction, by which the courts would otherwise be governed. If, however, such was the fact, the testimony offered by the defendant falls far short of justifying the application in this case of such an exception to the general rule to which reference has been made, and the court did not err in excluding it from the jury. * * *

For error in instructions as to ratification, reversed and remanded.[39]

SECTION 5.—GENERAL AND SPECIAL AUTHORITY

PACIFIC BISCUIT CO. v. DUGGER.

(Supreme Court of Oregon, 1901. 40 Or. 302, 67 Pac. 32.)

Verdict and judgment for the defendant. Plaintiff appeals.

BEAN, C. J. This is an action to recover the value of goods, wares, and merchandise alleged to have been sold and delivered to the defendant. In March, 1899, the defendant purchased of her son a cigar

[39] Quoted and applied in Henry v. Lane, 128 Fed. 243, 62 C. C. A. 625. As to the extent of express and implied authority, see Gregory v. Loose, 19 Wash. 599, 54 Pac. 33 (1898), ante, p. 54. In discussing the power of the trustee of a church to bind the church by agreements with the contractor, outside the building contract, the court said in Moyle v. Congregational Society, 16 Utah, 69, 50 Pac. 806 (1897): "But if Mr. Hollister, in a public manner, and for such a length of time that it would be presumed that the defendant knew of such acts, exercised authority of a superintendent, and did all he is shown to have done, the law would imply that he had authority to do those things of a similar character. Implied authority to do certain things confers on the agent no greater power than express authority to do the same thing. Mr. Mechem, in his excellent work on Agency (section 274), says: 'Although, as has been seen, authority may be implied from the words and conduct of the parties, or from the circumstances of the case, yet the extent of the authority so implied cannot exceed the necessary and legitimate effect of the facts from which it is inferred, but must be limited to the performance of like acts under like circumstances.' And in section 312 the same author says: 'If the agency arises by implication from acts done by the agent with the tacit consent or acquiescence of the principal, it is to be limited in its scope to acts of a like nature. If it arises from the general habits of dealing between the parties, it must be confined in its operations to dealings of the same kind. If it arises from the previous employment of the agent in a particular business, it is, in like manner, to be limited to that particular business. In other words, an implied agency is not to be extended by construction beyond the obvious purpose for which it is apparently created.' In order for an agent to bind the principal, it must appear that the acts done by the agent were in the exercise of the power delegated to him, and within the limits and scope of the power. Blum v. Robertson, 24 Cal. 128–141; Hirshfield v. Waldron, 54 Mich. 649, 20 N. W. 628."

The facts and part of the opinion in this case are given on p. 104.

As to the limits of implied power, see, also, Gates Iron Works v. Denver Engineering Works, ante, p. 313.

and confectionery business in Independence, some miles distant from her home in Linn county. It was agreed that he should remain in general charge of the store as her agent, with authority to sell and dispose of the goods and replenish the stock as it might be necessary, but he was instructed not to buy on credit. In October, November, and December, 1899, he purchased on credit of the traveling salesman of the plaintiff and its assignors, who had no knowledge of his instructions, the merchandise mentioned in the complaint, which was received in the store, and either sold and disposed of by him in due course of business, or by the defendant a short time thereafter, when the stock was sold in bulk.

Upon these facts, the single question presented is whether the defendant is liable for the goods so purchased by her son, and this depends upon whether he is to be regarded as a general or special agent. If his agency was special, the defendant is not liable, because he exceeded his authority; but, if general, his principal is bound, notwithstanding he acted contrary to her instructions. A general agent is one authorized to transact all his principal's business, or all his business of some particular kind, while a special agent is one authorized to do one or more specific acts in pursuance of particular instructions, or within restrictions necessarily implied from the act to be done. 1 Am. & Eng. Enc. Law (2d Ed.) 985.[40] Within these definitions, the defendant's son must be regarded as a general agent. The mere fact that his authority was confined to a particular business did not make him a special agent. He was given full charge and control of the business, with power to sell and dispose of the stock and replenish it by purchasing new goods; and therefore his principal is liable for his acts, within the scope of his apparent authority, notwithstanding he may have disregarded his secret instructions. If a general agent disregards his instructions, his acts will nevertheless be binding on his principal, so far as third persons who deal with him without notice are concerned, although he may be personally liable to his principal therefor.

This rule has been frequently applied by the courts to facts similar to those in hand. Thus, in Drug Co. v. Lyneman, 10 Colo. App. 249,

[40] For definitions of general and special agents, see ante, p. 20. That there is a well-settled distinction in the rules of liability for the acts of general and of special agents is often asserted, particularly in the older cases. Munn v. Commission Co., 15 Johns. 44, 8 Am. Dec. 219 (1818). That the authority is limited to a particular business does not make it special, therefore it may be as general in regard to that as though its range were unlimited. Anderson v. Coonley, 21 Wend. 279 (1839), approved and elaborated in Cruzan v. Smith, 41 Ind. 288 (1872). See, also, Fishbaugh v. Spunaugle, 118 Iowa, 337, 92 N. W. 58 (1902); Noble v. Nugent, 89 Ill. 522 (1878); Wheeler v. McGuire, 86 Ala. 402, 5 South. 190, 2 L. R. A. 808 (1888); Liddell v. Sahline, 55 Ark. 627, 17 S. W. 705 (1891). Even in courts making this distinction, it is nevertheless recognized that a general agent, acting under specific instructions known to third persons, has no more power to bind his principal by acts outside those instructions than has a special agent. U. S. v. Williams, Fed. Cas. No. 16,724, 1 Ware (175) 173 (1830).

50 Pac. 736, a drug business belonging to a married woman was conducted by her husband as general manager, and she was held liable for the goods purchased by him, although she told plaintiff's salesman that her agent must no longer buy goods of his company; it being assumed that, because the goods were delivered and mingled with the stock and sold, the limitation on the authority of the agent had been withdrawn. In White v. Leighton, 15 Neb. 424, 19 N. W. 478, the defendant was carrying on a business through an agent, under an agreement that he was not to give orders for goods without the consent of his principal. The court held, however, that because the agent was in charge of the business, and held out to the world as having authority to do everything necessary to carry it on, his principal was liable for merchandise purchased by him of parties having no notice of the limitation of his authority. In Palmer v. Cheney, 35 Iowa, 281, the defendant was engaged in the mercantile business, which was under the control of her son as her general agent. The goods constituting the foundation of the plaintiff's claim were purchased by the son, received at the store, and sold as other goods were. The defendant was held to be liable, although she was present when the order was given, and directed her son, in the presence of the plaintiff's agent, to buy no more goods than he could pay for at the time. The court ruled that the fact that the goods were received at the store and disposed of by the defendant's agent amounted to a ratification of the contract of purchase, and that the instruction given by defendant to her agent to buy no more goods than he could pay for did not have the effect of limiting his authority, or depriving him of the character of a general agent. In McDowell v. McKenzie, 65 Ga. 630, it was held that a merchant whose agent purchased goods in New York on credit, although the credit was unauthorized, could not refuse to pay, when he had received and sold the goods and pocketed the proceeds. See, also, Smith v. Holbrook, 99 Ga. 256, 25 S. E. 627; Webster v. Wray, 17 Neb. 579, 24 N. W. 207; Stapp v. Spurlin, 32 Ind. 442; Cruzan v. Smith, 41 Ind. 288.

It follows from these views that the judgment of the court below must be reversed, and a new trial ordered.

SORREL v. BREWSTER.

(Supreme Court of Michigan, 1850. 1 Mich. 373.)

Assumpsit. Verdict for plaintiff. New trial denied.

GREEN, J.[41] The first inquiry which naturally arises in this case, is, what was the nature and extent of Raitte's agency, in purchasing the furs in question, as between Brewster, his principal, and the plaintiff? If we are able to arrive at a satisfactory conclusion upon this

[41] Part of the opinion is omitted.

question, there will be no serious difficulty in determining the rights of the parties involved in this suit.

The only evidence of Raitte's power to act as the agent of Brewster, is found in the letters of Brewster, dated the 24th of April, 1844, one of which is addressed to the plaintiff, and the other to Raitte.

In his letter to the plaintiff, the defendant says: "On my return to Fort Wayne yesterday from the south, I found your letter of the 9th inst., advising me that you had from five thousand to eight thousand fur skins, mostly coon, which you wished to sell, and which I should be glad to purchase. As my business will detain me one or two weeks yet in this country, I have this day written to Mr. Thos. G. Raitte, of Norwalk, who is my agent, to make you a visit for the purpose of purchasing your furs, and I hope and trust that you and Mr. R. will be able to make a bargain for your lot of furs."

In his letter to Raitte of the same date, the defendant says: "Annexed I hand you a copy of a letter which I received yesterday at Wayne, from Mr. Sorrel of Lithopolis, and I wish you to see Mr. S. without delay, and see if you can purchase his lot of furs; but if you cannot make a trade with him for them, I wish you to write me at Fort Wayne (to which place I shall return and remain one or two weeks), and also to Maumee City and Detroit, so that I shall get your letter at one of those places, and I will go and see Mr. S. with you, and see if I can't purchase them. If you can't buy Mr. S.'s furs, I wish you to make an agreement with him to keep them until I can see him, as it will not do for us to lose so large a lot of furs this season."

There does not appear to be any evidence that the contents of this last letter were made known to the plaintiff at or before the time of the sale, nor is it at all material whether such was the fact or not, there being nothing in it which does not harmonize perfectly with that written to the plaintiff.

The defendant, then, must be held bound by the acts of Raitte, as his agent, to the extent to which he held him out, in his letter to the plaintiff, as being authorized to act for him. In that letter he informs the plaintiff that Raitte is his agent, and that he has written to him to make the plaintiff a visit for the purpose of purchasing the lot of furs in question, and hopes they will be able to make a bargain for them. Here is no restriction, or limitation, or condition whatever imposed upon the power of the agent in making the purchase indicated by the principal; but the fact of the agency is announced in the most general terms, accompanied by an invitation on the part of the principal to the plaintiff to bargain with the agent as such.[42]

[42] Some cases distinguish between the extent of the authority, whether limited or unlimited, and the nature of the agency, whether general or special. In either case an agent, acting within the general scope of the authority, held out to the world by the principal, will bind him. Noble v. Nugent, 89 Ill. 522 (1878), citing Doan v. Duncan, 17 Ill. 272 (1855). Others regard an agency

This case is, then, very clearly distinguishable from that class of special agencies, in which the agency is not held out by the principal, by any acts, or declarations, or implications, to be general in regard to the particular act or business. In the latter case it must from necessity be construed according to its real nature and extent; and the other party must act at his own peril, and is bound to inquire into the nature and extent of the authority actually conferred. Story on Agency, § 133.

In a note to this section, Judge Story very justly remarks, that "the whole difficulty, in considering this doctrine, arises from confounding two things with each other, which are essentially distinct, namely, the extent of the authority given to an agent, whether it be limited or unlimited, with the nature of the agency in which he is employed, whether it be general or special. A person may be a general agent, that is, he may be employed in the general business of his principal, and yet he may be privately limited in the exercise of his agency, by certain instructions given by his principal, far within the general scope of that business. On the other hand, he may be a special agent, that is, he may be employed for a particular object only, and yet he may have an unlimited authority to act within the scope of his agency in that particular affair, or he may be limited therein by like instructions."

In section 133, before referred to, Judge Story illustrates the doctrine thus: "If a merchant should appoint a special agent pro hac vice, to buy or sell a cargo of cotton for him in his discretion, and he should, by an open letter, state that he had so authorized the agent to buy or sell on his account, and that he would ratify and confirm his acts in the premises; a person who should deal with the agent upon the faith of that letter, and buy or sell the cargo of cotton accordingly, would be entitled to hold the principal bound by the acts of the agent, although the latter might have violated his secret instructions as to the price of the cotton purchased or sold." See, also, note 2 to section 127, Id.

Let us apply this doctrine, thus explained and illustrated, to the case before us. The defendant advertises the plaintiff that Raitte is his agent, and that as such he has requested him to visit the plaintiff, to purchase his lot of furs. He makes no allusion whatever to any restriction of his agent's power. He thus recommends Raitte to the plaintiff's confidence, as one with whom he may safely bargain for the sale of his furs. What, then, had any arrangement between the defendant and Raitte, of which the plaintiff had no knowledge, to do with the rights of the parties? The plaintiff has a right to hold

under limited and circumscribed powers as a special agency. See Gibson v. Snow Hardware Co., 94 Ala. 346, 10 South. 304 (1891), ante, p. 19; Bohart v. Oberne, 36 Kan. 284, 13 Pac. 388 (1887), and Littleton v. Loan Ass'n, 97 Ga. 172, 25 S. E. 826 (1895), especially the dissenting opinion of Atkinson, J.

the defendant bound by the acts of his agent, within the scope of that agent's authority, notwithstanding such agent may have acted in bad faith towards his principal, or violated any instructions, or private understanding or agreement between them. Hence, the testimony which was offered on the part of the defendant, of an agreement between himself and Raitte, in regard to the advance of moneys and the purchase of furs, was irrelevant, and the objection made to its introduction was well grounded.

Putting this testimony entirely out of the case, the facts appear thus: Raitte, as the agent of the defendant, acting under a general authority for that purpose, bargained with the plaintiff for his entire lot of furs. Upon ascertaining the quantity, it appeared that they amounted to more than the parties had anticipated, and Raitte stated to the plaintiff that he had not funds enough with him to pay the entire sum to which they amounted. For the balance, it was then agreed that Raitte should give the plaintiff Brewster's due bill, which was done, and the furs were all afterwards delivered by Raitte to the defendant. * * *

McALPIN v. CASSIDY.

(Supreme Court of Texas, 1856. 17 Tex. 449.)

Suit for $915.20 for goods and merchandise furnished, sold, and delivered. Answer, payment to agents of plaintiffs.

WHEELER, J.[43] There were two principal questions contested at the trial: (1) Whether Hill was the agent of the plaintiffs; (2) whether, as agent, he had authority to receive payment of the debt of his principal in satisfaction of his own individual debts. The decision of the case turned mainly on the latter question; and the verdict and judgment affirm that he had such authority.

There is no question that Field was the general agent of the plaintiffs. He appears to have had authority for soliciting, receiving and forwarding orders upon their house, collecting moneys due them, and promoting generally the extension of their business. This appears to have been the general scope of his authority; and the evidence was, perhaps, sufficient to authorize the jury to conclude that Hill had a like agency and authority. This, however, is the utmost which the evidence respecting his general authority can be claimed to have established. The question then is, whether it was within the scope of his authority, as such agent, to accept satisfaction of the debt of his principal in the payment of his own debts. And it is clear that, without the consent of his principal, express or implied, it was not. His authority as a collecting agent gave him no right to change the security of his principal for the debts, or to make himself the debtor to the principal for the like amount in lieu of the persons who owed

[43] Part of the opinion is omitted.

the debts, without the consent of the principal, express or implied, to that effect. Story on Agency, §§ 99, 413.

There is no evidence of any express authority or assent, on the part of the plaintiffs, to any such arrangement; or of any usage of trade, or of any course of dealing between the parties, from which such authority might be implied. There is nothing in the evidence to warrant the belief that the agent had authority to receive payment otherwise than in the ordinary mode of business; and that is, ordinarily, to receive it in money only. Story on Agency, §§ 98, 99, 181; Robson v. Watts, 11 Tex. 764. There may be circumstances which will vary this duty. But there are none such in this case. The same general principle pervades all cases of agency, whether general or special; that is, that the principal is bound by all the acts of his agent within the scope of the authority which he holds him out to the world to possess. But when the agent exceeds the scope of that authority, no act of his is binding on his principal. A general agency properly exists where there is a delegation of authority to do all acts connected with a particular trade, business or employment. But such an agent can no more bind his principal when he transcends the scope of his employment, than can a special agent whose authority is limited to a single act. Every agency carries with it, or includes in it as an incident, all the powers which are necessary, or proper, or usual, as means to effectuate the purposes for which it was created, and none other.

In this respect there is no distinction, whether the authority given to an agent is general or special, expressed or implied. In each case it embraces the appropriate means to accomplish the desired end, and is limited to the use of those means. If the agency arises by implication from acts done by the agent with the tacit consent or acquiescence of the principal, it is deemed to be limited to acts of a like nature; if from the general habits of dealing between the parties, it is deemed to be limited to dealings of the same kind; if from the employment of the agent in a particular business, it is in like manner deemed to be limited to that particular business. "And the authority must be implied from facts which have occurred in the course of such employment, and not from mere argument, as to the utility and propriety of the agent's possessing it. If it arises from an authority to do a single or particular act, the agency is limited to the appropriate means to accomplish that very act, and the required end; and the implied agency stops there. In short, an implied agency is never construed to extend beyond the obvious purpose for which it is apparently created. The intention of parties, deduced from the nature and circumstances of the particular case, constitutes the ground of every exposition of the extent of the authority, and when that intention cannot be clearly discovered, the agency ceases to be recognized or implied." Story on Agency, § 87. It is upon this principle that it is held that an agent employed to receive payment is not, in general,

clothed with authority to compound the debt, or to commute it for something else, as his own debt; but can only receive it in money, unless his particular employment confers the authority, or it can be implied from the general usage of business, or the habits of dealing between the parties. This is the well settled doctrine of the law, and it is obviously founded in reason and justice.

The only evidence of an express authority to Hill to collect the debt or receive payment is found in the testimony of Hill himself, to the effect that Field, after collecting a part, placed the balance of the claim in his hands, telling him that he was satisfied that Cassidy, one of the defendants, was considerably involved, and authorized him to settle the claim in any way that would be advantageous to the plaintiffs. It cannot be pretended that this gave the authority claimed for Hill, of using the claim to pay off his own various indebtedness, whenever and however contracted, even if Field had been empowered by the plaintiffs to confer such authority. The attempt seems to have been to justify the assumption of authority by Hill, and the extraordinary mode of settling the debt due the plaintiffs on the ground that Cassidy was in failing circumstances. But if it were so, the obvious duty of Hill under the authority from Field was, to take measures to secure the ultimate payment of the debt. The authority went to that extent and no further, unless, at least, it were proved that the other disposition made of it was most to the advantage of the plaintiffs. But the attempt to justify the assumption of authority on that ground appears to be unfounded in point of fact, as well as in law. The proof is that Cassidy was at that time considered solvent, and there is no evidence that his codefendant, who was jointly liable for the debt, was in failing circumstances. But it would make no difference, as respects the authority of the agent, if both were in failing circumstances and the plaintiffs were in danger of losing their debt; since the mode of settlement adopted was not in accordance with the ordinary mode of business under the circumstances, and there is no evidence of any usage of trade, or business habits of the parties, or any authorization or assent by the plaintiffs, express or implied, to such an arrangement. * * *

For errors in the trial, reversed and remanded.

BATTY v. CARSWELL.

(Supreme Court of Judicature of New York, 1806. 2 Johns. 48.)

Assumpsit upon a promissory note. Verdict for plaintiff.

LIVINGSTON, J., delivered the opinion of the court. This was a special power, and ought to have been strictly pursued. But the note, to which Abner Carswell authorised the witness to put his name, was

to be payable in six months; whereas, the one he signed had only sixty days to run. The note, then, as far as it concerned Abner, admitting there was no revocation, was made without his authority. His confession, after the suit was commenced, does not alter the state of the case. It was merely that he had allowed David to put his name to a note. This must have been the one of which the first witness speaks, which was to be payable in six months.

There must be a new trial, with costs to abide the event of the suit. New trial granted.

YOUNG v. HARBOR POINT CLUB HOUSE ASS'N.

(Appellate Court of Illinois. 1901. 99 Ill. App. 290.)

HARKER, P. J.[44] The plaintiff in error brought this suit to recover for breach of an alleged contract with the defendant in error whereby he was employed as room clerk for the hotel of the defendant in error for the summer season of 1899, at a salary of $100 per month. The case was tried by the court by agreement without a jury in connection with the one brought by L. C. Young against the Harbor Point Club House Association already considered in review by this court, 99 Ill. App. 292. The court found the issues against the plaintiff and entered judgment against him for the costs.

We agree with the conclusion reached by the trial court. There was no valid contract of employment made between the plaintiff and his father as agent of the defendant. The agency of plaintiff's father was a special and not a general one.[45] He was authorized to employ a room clerk subject to the approval of defendant as to salary. The proper construction to place upon the language of Tracy in his letter of March 25th, "We have always paid $75 per month for this position

[44] Part of the opinion is omitted.

[45] "This distinction between general and special agencies is sometimes very unsatisfactory. Whether the authority be general or limited, the servant cannot charge the master if he exceeds it. He is of course more likely to transcend the bounds of a narrow than of an extended power; but the principle in either case is the same: Within his commission he binds his master, beyond it he does not." 1 Minor's Institutes, 206, approved in Cross v. A., T. & S. F. R. R. Co., 141 Mo. 132, 42 S. W. 675 (1897). In the dissenting opinion of Comstock, J., Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank, 16 N. Y. 125, 148, 69 Am. Dec. 678 (1857), it is said that the distinction between general and special agencies is valuable in some cases, but in most of no value whatever. The difficulty is in applying the general principles to the particular facts, so as to determine from the facts the character of the agency and the authority. McIntosh & Huntington Co. v. Rice, 13 Colo. App. 393, 58 Pac. 358 (1899). It seems impossible to define the terms "general" and "special" in terms which make the definition applicable to each particular case. It by no means follows that one called a general agent has a certain power, but that when he is called a special agent this power may not be taken to be within the limits of his authority. Merchants' Insurance Co. v. N. M. Lumber Co., 10 Colo. App. 223, 51 Pac. 174 (1897).

and trust you can see your way to have your son accept at that price," is that it was a limitation upon his authority as to price. When the agency is special, the authority must be strictly pursued, and the principal is not bound if the agent exceeds his authority. It is the duty of a person dealing with a special agent to ascertain the extent of his authority, and if he does not, he must suffer the consequences. Williams v. Merritt, 23 Ill. 623; Blackmer v. Summit Coal & Mining Co., 187 Ill. 32, 58 N. E. 289.[46] All the knowledge the plaintiff had of his father's agency was derived from Tracy's letters. His father was not in control of the hotel but was more than a thousand miles away from it. * * *

Judgment affirmed.

BASS DRY GOODS CO. v. GRANITE CITY MANFG. CO.

(Supreme Court of Georgia, 1903. 119 Ga. 124, 45 S. E. 980.)

Action on contract for failure to deliver goods sold. Verdict for defendants.

LAMAR, J.[47] The court charged: "If you believe from the evidence * * * that Arnold sent Brown to the plaintiff with instructions to sell the goods in question to them at a certain price, or at figures not below a certain price, you would be authorized to find that Brown was the special agent of Arnold, and, as between Arnold and plaintiff, the plaintiff would be bound to take notice of the instruction given Brown by Arnold." This was error. Assuming that the goods were not on hand, and that therefore Arnold was principal, it appeared that he had written Brown, "While in Atlanta call on Bass Dry Goods Co. and try to close them the following pants." As Brown had been appointed traveling salesman, it could hardly be claimed that this letter amounted to a suspension of his general powers as such.

But even if it be treated as creating a special agency to sell particular goods to a particular person, the purchaser was only required to examine his authority. This the purchasers did when they read the letter. They were not bound by private instructions not included in the writing, but were justified in assuming that he could fix the price; that being an essential element in the contract of sale. While a general agent has broader powers than one selected to do a particular act, the authority in both cases must be construed to include all necessary and usual means for effectually executing it. Where one is appointed to sell a particular article to a particular person, this confers on the

[46] This is the more true when the special authority is in writing, and the act of the agent is not essential to the accomplishment of the purpose. Martin v. Farnsworth, 49 N. Y. 555 (1872). See, also, Fenn v. Harrison, 3 T. R. 757 (1790).

[47] Part of the opinion is omitted.

special agent authority to agree on the price; otherwise the appointment is illusory, and not real. Civ. Code 1895, § 3023; Barclay v. Hopkins, 59 Ga. 562; Holman v. Ga. R. Co., 67 Ga. 595.[48] * * *

Judgment reversed.

SECTION 6.—AUTHORITY FOR PARTICULAR PURPOSES

I. To Buy

BEECHER v. VENN.

(Supreme Court of Michigan, 1877. 35 Mich. 466.)

MARSTON, J. Venn brought an action of assumpsit against Beecher to recover a balance due on meat ordered for and delivered at the Biddle House in 1875. This meat was ordered by one Maxwell, and evidence was given on the part of the plaintiff tending to show that "Maxwell was in Beecher's employ at thirty dollars per month; that Beecher was the owner and proprietor of the hotel and employed Maxwell as his agent in and about the hotel, and in running it." The plaintiff further introduced evidence tending to show "that the defendant had caused to be inserted in the Detroit Tribune, and other papers, an advertisement, in which Maxwell was named as manager of the Biddle House." There was no evidence given tending to show any custom or established course of business which would authorize an agent in the employ of the proprietor of a hotel to purchase supplies for the same on credit of the proprietor, or that defendant had ever established such custom or practice. Evidence was also given by the plaintiff tending to show that defendant recognized his liability and agreed to pay any balance found due.

Evidence was also given tending to show that while defendant had held himself out as proprietor and owner of this house, that he had also held out one G. M. Pettee as his agent, and that a balance was due plaintiff for meat ordered by and delivered to Pettee for use at

[48] The general principles as to special authority have been stated many times, but the great difficulty arises in applying them, in determining what is the extent of the special authority, and what powers may be deemed necessary for its execution. White v. Langdon, 30 Vt. 599 (1858). The authority "includes, unless the inference is expressly excluded by other circumstances, all the usual modes and means of accomplishing the ends and objects of the agency." Mich. So. & N. Ind. R. R. Co. v. Day, 20 Ill. 375, 71 Am. Dec. 278 (1858). And if the principal clothes the special agent with the apparent muniments of a greater authority, he will be bound accordingly. Lister v. Allen, 31 Md. 543, 100 Am. Dec. 78 (1869); In the case of the special agent, however, third persons are under special duty to make inquiry concerning the authority. Dispatch Ptg. Co. v. Nat. Bank of Com., 109 Minn. 440, 124 N. W. 236 (1910).

the Biddle House. Evidence was given by defendant having a contrary tendency to the above.

It is insisted that there was no evidence that Maxwell had authority to buy the meat on defendant's credit, and that the evidence did not show any subsequent recognition by the defendant of his liability, or of Maxwell's authority, and that the court erred in not so instructing the jury.

We do not discover any error in the charge as given, or in refusing to charge as requested, upon this part of the case. The evidence fairly tended to show that Maxwell had authority to bind the defendant in making the purchase. Where the owner and proprietor of a hotel employs another as his agent in and about the hotel, and in running it, and holds such person out as manager of the house, we are of opinion a jury would be warranted in finding from such evidence that such a person had authority to purchase the usual and necessary supplies for the hotel, and to bind his employer in making such purchases. Such an agent cannot well manage and properly take care of a hotel if he has not the authority claimed in this case.[49]

Complaint is also made of that part of the charge illustrating this case by the authority of a wife to purchase necessaries. The jury, we think, could not have been misled by what was said; they were cautioned against applying the illustration or analogy fully to the case before them.

As we discover no error, the judgment must be affirmed with costs. The other Justices concurred.

BORN v. SIMMONS.

(Supreme Court of Georgia, 1900. 111 Ga. 869, 36 S. E. 956.)

Action between W. H. Born and W. E. Simmons. From the judgment, Born brings error. Reversed.

SIMMONS, C. J. By a power of attorney which authorizes the agents "to transact all such business as I may not be able to attend to in person, to take charge of and attend to the collection of all my outstanding debts, * * * to look after the collection of rents, make divisions of crops with tenants, make such compromises and settlements as in their judgment is for my interest, make sale of such property as I may desire to dispose of from time to time, and generally to do and perform all acts that I might do were I in good health, and for this purpose * * * to sign my name to bonds, receipts, and such other papers as may be necessary in the transaction of the business heretofore set forth," the agents are not given

[49] A superintendent of a mine has authority, by virtue of his position alone, to buy provisions for a boarding house which are absolutely necessary to enable the mine to continue in operation, but not to buy articles which are clearly not so required. Heald v. Hendy, 89 Cal. 632, 27 Pac. 67 (1891).

power to purchase mules and wagons and give promissory notes therefor. The general words in the power must be construed with reference to the specified objects to be accomplished, and limited by the recitals made in regard thereto. Mechem, Ag. §§ 306–308; Claflin v. Jersey Works, 11 S. E. 721, 85 Ga. 27, and cases cited.[50]

PER CURIAM. Judgment reversed.

SMITH PREMIER TYPEWRITER CO. v. NATIONAL HARTEL LIGHT CO.

(Supreme Court of New York, Appellate Term, 1911. 72 Misc. Rep. 405, 130 N. Y. Supp. 136.)

SEABURY, J. This action was brought to recover $100 alleged to be the agreed price of a typewriter sold and delivered to the defendant corporation. The evidence is insufficient to establish that the defendant purchased or ratified the alleged purchase of the typewriter. It appears from the record that the defendant had in its employ a bookkeeper. On November 10, 1910, the defendant's bookkeeper, under the express direction of an officer of the defendant, signed an order for one typewriter. This typewriter was delivered and paid for. On December 1, 1910, the same bookkeeper signed a second order for an additional typewriter. The typewriter was delivered to the defendant. Upon receiving the typewriter, the defendant promptly repudiated the order given by the bookkeeper, and requested the plaintiff to remove the typewriter from the defendant's place of business.

The record affirmatively shows that the bookkeeper had no actual authority to make the purchase. While it is true that authority of an assumed agent to make a purchase will be implied, where the alleged principal has repeatedly recognized and approved of similar acts, still a single act done under express authority is insufficient to justify the inference that the assumed agent has the apparent authority to subject the alleged principal to liability upon subsequent purchases made without actual authority. Woods v. Francklyn (Com. Pl.) 19 N. Y. Supp. 377. As the bookkeeper was without actual or apparent authority to make the purchase, the defendant was not bound by his act in attempting so to do.

The judgment is reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

[50] An agent of a manufacturing company, in charge of a branch store for the sale of its goods, has no authority to buy from another household goods to be delivered to third persons, though he represents to the seller that he has authority. Cowan v. Sargent Manfg. Co., 141 Mich. 87, 104 N. W. 377 (1905). There is no warrant for the assumption that the superintendent of one mill has any authority to buy for another mill. Hinde Paper Co. v. Atterbury, 107 C. C. A. 296, 185 Fed. 76 (1911). A manager of a business has not thereby authority to buy upon his employer's account. Meyer & Co. v. Baldwin, 52 Miss. 263 (1876).

SALMON v. AUSTRO-AMERICAN STAVE & LUMBER CO

(Circuit Court of Appeals of United States, Second Circuit, 1911. 187 Fed. 564, 109 C. C. A. 254.)

LACOMBE, Circuit Judge.[51] * * * The paper which is relied upon as showing the terms of the alleged contract is in the form of a letter, dated Shreveport, La., April 26, 1904, addressed to defendants in New York, and signed by the manager of plaintiff's mill, who had authority to make contracts of sale. The Mr. Gott referred to in the letter was a representative of defendants who had come to Shreveport from New York in reference to the sale of plaintiff's 1904 cut. The important parts of the letter are as follows: "We confirm herewith our verbal agreement made with your Mr. Harry J. Gott. We agree to sell to you and you agree to buy from us all the selects and the firsts and seconds and box boards contained in our cut of cottonwood lumber beginning from May 1, 1904 and ending Dec. 31, 1904, this cut to consist of the maximum of eight million feet in all. The prices will be as follows: $17 for selects, $20 for firsts and seconds, and $25 for box boards. These prices are for 1,000 feet board measure f. o. b. cars, Shreveport. Net cash. You will advance to us on each first of the month for the month previous on this contract $10 per 1,000 feet board measure on basis of log run mill cuts or No. 3 common cut. This advance to be made on the box common lumber which is not sold under this contract, in consideration of a rate of 6 per cent. interest, and on the other lumber, will say selects and better, the advance is made free of interest. The lumber is to be well manufactured and sawn * * * so as to be one inch thick when dry. The lumber is to be well piled by us in our mill yard. The advance of $10 per 1,000 feet board measure has to be based upon the measurement of our inspector as said lumber is sawn, after allowing 5 per cent. for shrinkage for drying. The payment is to be made in such a way that we will draw sight draft on you, attaching to the said draft a bill of sale for the lumber cut during the month. * * * All the lumber under this contract, selects and better, has to be shipped and paid for in full inside of six months after it is cut."

After provisions for revision of measurement, segregating, numbering, and marking each pile subject to advance, inspection, and loading on cars, the contract proceeds: "The advance of $10 per 1,000 on box lumber which grade is not sold under this contract, has to be repaid to you according to shipments made at the end of the month, including the 6 per cent. interest less the difference in the price of the selects and better shipped out during the month. For instance, if we ship out 500,000 feet of box lumber during one month, we have to pay back to you at the end of the month $5,000 plus 6

[51] Part of the opinion is omitted.

per cent. interest on this $5,000. From this amount is to be deducted the difference between the $10 and the price agreed upon the selects and better shipped out during the said month. On account of the short time your Mr. Gott had to spend here, we leave it to you to draw up a contract under the terms mentioned in this letter, and we agree to sign and return it to you."

There is a sharp conflict of testimony as to what took place when this paper was drawn up; but, the verdict being for plaintiff, we must accept the narrative of Kobler, its manager. The writing embodied correctly the terms of an agreement between himself and Gott, it was signed "The Austro-American Stave and Lumber Company," by Kobler, and Gott also signed with his own name, "H. J. Gott," in the presence of a witness who also signed. There was a carbon copy. Gott took the original away with him.

The first question raised in the case was whether Gott had any authority, or any apparent authority, to enter into this contract on behalf of the plaintiff. He was a young man of 27, sent down to Shreveport by defendants after some correspondence between them and the plaintiff. Examination of the alleged contract shows that it is a peculiar one. It provides for the sale, purchase, and delivery of lumber to be cut, which shall be of certain specified grades. It further provides for advances on account of the purchase price to be made from time to time as such lumber is cut, and also for measurement, inspection, shipping, etc. All these clauses are usual in contracts of this sort, and any one who had apparent authority from another person to purchase lumber for such other might very well be supposed to have authority to bargain as to those provisions, as to when advances should be made, in what amounts, etc.

But this document contains other provisions which are certainly unusual. It requires the purchaser of the higher grades to make advances, not only on the monthly cut of such grades, but also on the monthly cut of the lower grade, which he had not agreed to buy. And this lower grade, as we have seen, is more than one-half of the total amount of lumber cut. In other words, at the end of each month the purchaser is to pay part of the purchase price of the lumber cut for him during that month, and is also to lend to the seller a sum of money, at the rate of $10 per 1,000 feet board measure for all box common lumber cut by the seller for his own use or to be sold by him to some one else. For this loan the seller is to pay interest at 6 per cent. until it is repaid. Moreover, the time of such repayment is left uncertain. The language is, "If we ship out 500,000 feet of box lumber (common) during one month we have to pay back to you at the end of the month $5,000 plus 6 per cent. interest," but there is no guarantee that 500,000 feet, or even one foot, will be "shipped out" in any particular month. If the seller were not able to find a purchaser for his box common month by month as it was

cut, it would not be shipped out, and it would soon come to pass, that, besides paying advances on their own lumber defendants would be loaning plaintiff many thousands of dollars to enable it to carry its lumber and to continue cutting more of it to sell to some one else.

We are clearly of the opinion that Gott's assent to this proposal cannot be held to bind defendants, unless the record discloses apparent authority to make some such unusual contract. * * *

The court found no evidence of such authority to the agent. Judgment for plaintiff reversed.

BROWN v. JOHNSON.

(High Court of Errors and Appeals of Mississippi, 1849. 12 Smedes & M. 398, 51 Am. Dec. 118.)

SHARKEY, C. J.[52] R. M. Johnson authorized B. F. Johnson to purchase for him a particular parcel of land, being part of section 32 in township 9, range 4 west, which was about to be sold under a decree of the chancery court, for default of payment by a purchaser from the state, it being part of the seminary lands. The agent did not buy the land he was authorized to purchase, but bid off and purchased, in the name of his principal, part of section thirty-one. He borrowed money in the name of his principal, to make the cash payment required by the terms of the sale, and in his name, also, executed bonds to the state for the remaining two thirds of the purchase money.

So soon as R. M. Johnson was informed of what had been done, he disaffirmed the contract of the agent, and filed a petition in the chancery court to prevent the confirmation of the sale, and the chancellor thereupon set it aside, and ordered the bonds to be delivered up, and also that the land should be resold according to the terms of the original decree. Governor Brown, some time afterwards, filed a petition that the order of rescission should be set aside, which was refused, and thereupon an appeal was prayed, which professes to be an appeal from the original order. As counsel have filed a written agreement that the merits of the case only shall be considered, we pass over objections that might arise to the regularity of the proceedings.

The case was decided at last January term, but a re-argument was granted. It was then decided that the sale was void, because the agent had exceeded his authority. This is undoubtedly so. The authority in this instance was particular or special, and required to be strictly pursued. If the agent vary from an authority of this description, his act is void as to his principal. Paley on Agency, 150.

[52] Part of the opinion is omitted.

The agent had no authority whatever to purchase any part of section thirty-one, and the principal was entitled to have his bonds delivered up.[53] * * *

Reversed and remanded for other reasons.

SAUGERTIES & N. Y. STEAMBOAT CO. v. MILLER.

(Supreme Court of New York, Appellate Division, 1902. 76 App. Div. 167, 78 N. Y. Supp. 451.)

Action to recover charges for carrying horses, carriages, and baggage of defendant between his residences at Rhinecliff and at Newport. Defendant had directed his head coachman to have them transported, and had given him the money to pay the expenses, but the coachman had it charged to defendant.

SMITH, J. In Mechem, Ag. § 363, the right of an agent to pledge the credit of his principal is thus stated: "An agent authorized to purchase goods for his principal, and who is supplied with funds for that purpose, has no implied authority to bind his principal by a purchase on credit; and in such a case the principal will not be bound by a purchase on credit, although the goods come in fact to his use, unless he has knowledge of the fact, and does something in ratification of it, or unless it be shown that it is the custom of the trade to buy on credit." [54]

In Brooks v. Mortimer, 10 App. Div. 518, 42 N. Y. Supp. 299, the opinion, in part, reads: "In order to uphold this position, we must establish it as a rule of law that the mere relation of master and servant implies a right in the servant to use the credit of the master to obtain

[53] Authority to buy cannot be inferred from mere authority to sell, for the acts are so distinct in nature that neither is in general dependent upon nor incidental to the other. Keyes v. U. P. Tea Co., 81 Vt. 420, 71 Atl. 201 (1908). It would be a startling rule of law that an agent, specially employed to sell his principal's wares, can bind his principal by buying from third persons on his principal's account. Finance Co. v. Old Pittsburgh Coal Co., 65 Minn. 442, 68 N. W. 70 (1896).

An agent to manage a beer business has no authority to buy whisky. Hackett v. Van Frank, 105 Mo. App. 384, 79 S. W. 1013 (1904). One employed to manage a business in the manufacture and sale of logs and lumber may hire men, mills, and vessels, but not purchase mills, fixtures, and make permanent improvements. Holmes v. Morse, 50 Me. 102 (1862). One authorized to employ, pay, and discharge farm laborers is not authorized to purchase goods on credit, not even clothing for the men employed on the farm. Carter v. Burnham, 31 Ark. 212 (1876).

The opinions of Clayton and Thacher, JJ., are omitted.

[54] When the principal has put the agent in funds, and the third person accepts as part payment the agent's check, he cannot look to the principal to make good the amount, for he must be deemed to have accepted the responsibility of the agent instead of the principal. Cleveland v. Pearl, 63 Vt. 127, 21 Atl. 261, 25 Am. St. Rep. 748 (1890). For further extensions of the principle, see Bohart v. Oberne, 36 Kan. 284, 13 Pac. 388 (1887); Cochran v. Richardson, 33 Vt. 169 (1860); Komorowski v. Krumdick, 56 Wis. 23, 13 N. W. 881 (1882).

such articles as the servant uses in the performance of his duties, and that, where the articles are furnished to the servant and used by the master, an obligation is created upon the master's part to pay therefor; and this without regard to the limitations which the master may have imposed upon the servant, or the provisions which he may have made to provide the servant with supplies he is required to use. We believe that the doctrine of implied liability has never been carried thus far. It has never been held, so far as we are aware, that the mere relation of master and servant created in the servant the right to use the credit of the master, and impose liability upon him. * * * If, however, Mathieu is treated as the agent of the defendant for the purpose of purchasing supplies for his household, the result would not be different. It is settled that an agent may not buy on credit, and charge the principal, where the latter has furnished funds with which to buy. Laing v. Butler, 37 Hun, 144, affirmed in 108 N. Y. 637, 15 N. E. 442; Komorowski v. Krumdick, 56 Wis. 23, 13 N. W. 881; Mechem, Ag. § 363." See, also, Jaques v. Todd, 3 Wend. 83.

This rule of law is a salutary one, and seems to be necessary for the protection of principals against the fraudulent acts of their agents. The seller can always protect himself by demanding cash or proof of authority to purchase upon credit. With any other rule, the principal is powerless to protect himself against the fraud of an agent, who may, under the rule as held below, squander the funds intrusted to him, and pledge the credit of the principal for the purchase made. If the principal seeks to protect himself by requiring all authorized purchases of his agent to be made upon credit, and advancing no funds therefor, he then renders himself liable for unauthorized purchases made upon his credit. It is a well-recognized rule of law that, if a principal authorize the agent to pledge his credit for property or services which he is authorized to procure, he gives to him an implied authority to pledge his credit for whatsoever he may purchase, though unauthorized, if it be within the scope of his agency. The principal could only protect himself by personally superintending all purchases. This, of course, is impossible. The strict limitation of an agent's power to pledge the credit of the principal is an essential safeguard to large commercial transactions which must be conducted through agents. It is a limitation of which the law gives notice to all persons dealing with agents.

I am unable to see any distinction in principle between the purchase of property on credit and the purchase of service upon credit. If there be no implied authority from the fact of agency in an agent to pledge the credit of his principal for property purchased and used by the principal, I am unable to see why there should be any implied authority in the agent from the mere fact of agency to pledge the credit of his principal for services rendered. This plaintiff could have protected himself by demanding cash for the transportation, and could even have enforced that demand by asserting its lien. This is not a case where

II. To Sell Personal Property

(A) In General

PEERLESS MACHINE CO. v. GATES.

(Supreme Court of Minnesota, 1895. 61 Minn. 124, 63 N. W. 260.)

CANTY, J.[57] This is an action of replevin, for the recovery of the possession of a threshing machine. Both parties claim title from the same vendor—the Geiser Manufacturing Company. Plaintiff claims that it purchased the machine from the Geiser Company July 17, 1892, and defendant claims that he purchased it from the Geiser Company, and took possession of it, prior to that time, to wit, in October, 1891. On the trial, defendant had a verdict, and from an order denying its motion for a new trial plaintiff appeals.

1. There is evidence tending to prove that defendant got the machine from the Geiser Company for the purpose of putting it on trial, and introducing this class of machines among the farmers. However, both parties agree that defendant first took the machine on trial at the agreed price of $480, and that after trial he refused to accept it. Defendant claims that after this he purchased the machine from the Geiser Company, through one Lyttle, who he claims was its agent, for the price of $240, from which was to be deducted a discount of $50, and also $30 which he had paid for freight. Plaintiff denies this, and claims that there is no evidence that Lyttle had any authority from the Geiser Company to sell the machine, and therefore no evidence to sustain the verdict. The evidence of his authority is certainly not very satisfactory. However, plaintiff introduced evidence tending to prove that one Bell was the "traveling agent" of the Geiser Company, and defendant testified that, in the presence of Bell, Lyttle represented to plaintiff that "he was the agent for the company, and had full control in this part of the country." We are of the opinion that, under all the circumstances of the case, the question of Lyttle's authority was for the jury. * * *

5. Several parts of the charge are excepted to. The court charged the jury as follows: "The court charges you that the possession of the property by a man is presumptive evidence of ownership—presumptive evidence of the right to sell it; and there is only one place where such a thing can be questioned, and that is where the property has been stolen, and there is no such claim here. Consequently, the property being in possession of Lyttle, he had a right to sell or dispose of it." "Plaintiff asks for certain instructions: * * * Second. 'That it is the duty of the party who deals with one not a general agent to inquire into the nature and extent of his agency, and

[57] Part of the opinion is omitted.

to deal with the agent accordingly.' This the court gives to you, with this modification: that where the party represents himself to be an agent, and has the property sought to be disposed of in his possession, that the rule is entirely altered. Third. 'That no man has a right, in dealing with an agent, to rely upon his own statements as to his authority.' The court gives you that, with the same modifications just stated. Fourth. 'You are instructed that the defendant has no right to rely upon the declarations of Lyttle as to his agency.' This the court gives you, with the same modification: that, if he had made this statement about any other property than that which he had in his possession, it would have been good law; but, with the property in his hand and possession, the rule is otherwise. Fifth. 'You are instructed that if the agent of the Geiser Company, Lyttle, was only a special agent, in dealing with him it was incumbent upon Gates to inquire into Lyttle's authority, and not rely upon his own declarations and acts.' This the court gives you, with the modifications stated before."

From this it will be seen that the trial court held, as a question of law, that Lyttle was in possession of the machine when he sold it to defendant, while there is hardly a shadow of evidence in the case tending to show that he ever was even in apparent possession of the machine. But, even if he was in possession of it, his possession was the possession of his principal. None of the indicia of ownership was given to him. He did not pretend to be the owner of the property, and his apparent possession of it was not evidence of his authority to sell it. Even if Lyttle, having such possession, had represented himself to be the owner of the property, and had sold it as such owner, the purchaser would have no title, even though there was apparently nothing to put him on his guard. Greene v. Dockendorf, 13 Minn. 70 (Gil. 66).

This disposes of all the questions raised having any merit. The order appealed from is reversed, and a new trial granted.

COVILL v. HILL.[58]

(Supreme Court of New York, 1847. 4 Denio, 323.)[59]

Trover for white pine lumber, shipped, according to the bill of lading, "for Miles Covill," by one Potter, to defendants for sale. No bill of lading was sent to defendants. Covill had a written contract

[58] Approved in Edwards v. Dooley, 120 N. Y. 540, 24 N. E. 827 (1890). See, also, Johnson v. Frisbie, 29 Md. 76, 96 Am. Dec. 508 (1868). Mere possession and control is entirely consistent with the relation of principal and agent. Wilson v. Loeb, 69 Ill. App. 445 (1896).

[59] See 1 N. Y. 522 (1848), in which the Court of Appeals ordered the case back for a new trial, on the ground that the facts necessary to constitute a conversion had not been shown.

with Potter that the lumber should be shipped by Potter, as the agent and in the name of the plaintiff, title to remain in plaintiff until the purchase money was paid. When plaintiff inquired of defendants as to the lumber, they answered that Potter was largely indebted to them and they had given him credit for the lumber on account of such indebtedness. They refused to deliver the lumber unless plaintiff would reimburse them for the advances they had made Potter. The latter for many years had been in the lumber business, shipping to defendants for sale on his account large amounts each year.

BRONSON, C. J.[60] It is a principle of the common law, which has but few exceptions, that a man cannot be divested of his property without his consent. And although possession is one of the most usual evidences of title to personal chattels, yet, as a general rule, mere possession will not enable a man to transfer a better title than he has himself or than he has been authorized by the owner to grant. Exceptions in favor of trade are allowed in the case of money and negotiable instruments. But as to other personal chattels, the mere possession, by whatever means it may have been acquired, if there be no other evidences of property, or authority to sell from the true owner, will not enable the possessor to give a good title. In Pickering v. Busk, 15 East, 38, ante, p. 319, which is one of the strongest cases in the books against the true owner, the broker not only had the possession of the hemp, but it had been transferred to his name in the books of the wharfinger by direction of the owner; and from this evidence, in connection with the fact that it was the ordinary business of the broker to make sales, an authority from the owner to sell was implied. So far has the rule for protecting the owner been carried, that although he sell and deliver possession of the property, if there be a condition that the title shall not pass until the price is paid, the voluntary assignee of the purchaser will acquire no right as against the owner. Haggerty v. Palmer, 6 John. Ch. 437. Nor will the creditors of the vendee acquire any such right, by receiving the property on account of their debts, or taking it by virtue of their executions or attachments. Strong v. Taylor, 2 Hill, 326; Hussey v. Thornton, 4 Mass. 405, 3 Am. Dec. 224; Marston v. Baldwin, 17 Mass. 606; Barrett v. Pritchard, 2 Pick. 512, 13 Am. Dec. 449. And see Root v. French, 13 Wend. 570, 28 Am. Dec. 482. But in the case of a conditional sale, with a delivery of possession, it may be that a bona fide purchaser, who parts with his money; or one who makes advances to the vendee on the property, trusting to the credit of appearances, will obtain a good title or lien; on the principle which is sometimes applied, that when one of two innocent persons must suffer from the fraud of a third, the loss shall fall on him who has enabled such third person to do the wrong. See Haggerty v. Palmer, 6 John. Ch. 437; Root v. French, 13 Wend. 570, 28 Am. Dec. 482; 2 Kent, 497.

[60] Part of the opinion is omitted.

But it is not now necessary to decide that question; for there was no conditional sale, nor a sale of any kind from the plaintiff to Potter. The title was never to vest in Potter; but only in such persons as should purchase from the defendants, to whom the lumber was to be shipped, and who were to sell it as the property of the plaintiff, and account to him for the avails, to the extent provided for by the contract. The plaintiff was to hold the possession as well as the title to the property until the purchase money should be paid. And although Potter was to ship the lumber to the defendants, he was to do it as the agent, and in the name of the plaintiff. The transaction amounted to nothing more than a bailment of the lumber to Potter for the purpose of forwarding it to the defendants to be sold, with an interest in the bailee as to all which the property might bring beyond the specified sum of $8.25 per thousand feet. Potter had no more power over the property as against the plaintiff, than though he had received it as a common carrier for hire, and without any other interest; nor did the plaintiff do any thing which was more likely to mislead third persons, than though he had delivered the property to Potter as such common carrier. And it hardly need be said, that a mere bailee can neither give a good title, nor create a valid lien as against the true owner. * * *

Judgment for the plaintiff.

HEATH v. STODDARD.

(Supreme Judicial Court of Maine, 1898. 91 Me. 499, 40 Atl. 547.)

WISWELL, J. Replevin for a piano. The piano was at one time the property of the plaintiff, who intrusted it to one Spencer for the purpose of taking it to, and leaving it at, the house of the defendant, but without any authority, as the plaintiff claims and as has been found by the jury, to sell the piano or to make any contract for its sale; the arrangement being, as the plaintiff claims, that Spencer should merely take it to and leave it at the defendant's house, and that a day or two later the plaintiff would go there and make a sale of it if he could.

Spencer had the piano taken to the defendant's house, but, instead of simply leaving it so that the plaintiff might subsequently sell it, he assumed authority in himself to sell it to the defendant, who bought it and paid in cash and otherwise the full purchase price fixed by Spencer, without any knowledge of his want of authority.

Spencer was himself a dealer in pianos and musical instruments, and, upon the very day when he made the arrangement with the plaintiff to take one of his (plaintiff's) pianos to the defendant's house, he had seen the defendant and attempted to sell him one of his pianos.

Upon the question of Spencer's authority as an agent the presiding justice instructed the jury as follows: "The mere fact that Spencer had possession of that piano and sold it to the defendant, even as the

defendant says, Heath's name not having been mentioned to the defendant, would not necessarily give a title to the defendant. To illustrate: Suppose you are a livery stable keeper, and you let a man have a horse to go from here to Portland. You let him have that horse, but it is for a special purpose—to go from here to Portland. He meets a man on the road, and asks him what he will give him for the horse, and they dicker, and finally the man whom he meets buys that horse for $125. You do not suppose that would divest you of the title as a livery stable keeper, because you never have given authority to that man to sell? You gave authority to that man to drive to Portland and back, and if any man was foolish enough to buy that horse of that man he will have to stand his chances. I give you this as an illustration. It may be an extreme illustration. Now, if a party allows another to take a piano, and go into the country to leave it, and that party who takes it sells it, and there is not any authority for that sale, then whoever purchases it in the country, or wherever it is left, or on the way, can obtain no greater title than the party has who sells it. So, it comes back to the question of whether this man Heath, the plaintiff in this case, ever authorized Spencer to so deal with that property, in the way of a sale of it, as to constitute him an agent for that purpose."

While these instructions were technically correct, so far as they go, we do not think that they were adequate, in view of the defendant's position, and we fear that the illustration given was so extreme as to be misleading.

A principal is not only bound by the acts of his agent, whether general or special, within the authority which he has actually given him, but he is also bound by his agent's acts within the apparent authority which the principal himself knowingly permits his agent to assume, or which he holds the agent out to the public as possessing. 1 Am. & Eng. Enc. Law (2d Ed.) p. 969, and cases cited.

Whether or not a principal is bound by the acts of his agent, when dealing with a third person who does not know the extent of his authority, depends, not so much upon the actual authority given or intended to be given by the principal, as upon the question, what did such third person, dealing with the agent, believe, and have a right to believe, as to the agent's authority from the acts of the principal? Griggs v. Selden, 58 Vt. 561, 5 Atl. 504; Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195; Walsh v. Insurance Co., 73 N. Y. 5.

For instance, if a person should send a commodity to a store or warehouse where it is the ordinary business to sell articles of the same nature, would not a jury be justified in coming to the conclusion that, at least, the owner had by his own act invested the person with whom the article was intrusted with an apparent authority which would protect an innocent purchaser?

In Pickering v. Busk, 15 East, 43, ante, p. 319, quoted by Mellen, C. J., in Parsons v. Webb, 8 Me. 38. 22 Am. Dec. 220, Lord Ellenborough

says: "Where the commodity is sent in such a way, and to such a place, as to exhibit an apparent purpose of sale, the principal will be bound and the purchaser safe." [61]

Let us apply this principle to the present case. Spencer was a dealer in pianos. Immediately before this transaction he had been trying to sell a piano to the defendant. There was evidence tending to show that the plaintiff knew these facts. With this knowledge, he intrusted the possession of this piano with Spencer for the purpose of its being taken by Spencer to the defendant's house with a view to its sale. Spencer was not acting merely as a bailee. He did not personally take the piano to the defendant's house, but had it done by a truckman or expressman. Spencer was employed for some other purpose. Whatever may have been the private arrangement between the plaintiff and Spencer or the limit of authority given by the plaintiff, would not a jury have been warranted in coming to the conclusion that the purchaser was justified in believing, in view of all of these facts, that Spencer had authority to sell, and that the plaintiff knowingly placed Spencer in a position where he could assume this apparent authority, to the injury of the defendant? We think that a jury might have properly come to such a conclusion, and that consequently the instructions were inadequate in this respect: that it was nowhere explained to the jury that a principal might be bound by the acts of an agent, not within his actual authority, but within the apparent authority which the principal had knowingly and by his own acts permitted the agent to assume.

Exceptions sustained.

CLOUGH v. WHITCOMB.

(Supreme Judicial Court of Massachusetts, 1870. 105 Mass. 482.)

Contract on an account annexed for the price of goods sold and delivered by plaintiff to defendant on an order taken by one Clark, traveling pedler. Clark had agreed to accept from defendant goods in exchange for the goods so ordered. The case came up on exceptions by plaintiff to charges of the court.

WELLS, J. It appears by these exceptions that the goods in question were delivered to the defendant by the plaintiff, directly; and

[61] In Leigh v. Mobile & Ohio R. Co., 58 Ala. 165 (1877), is a full and discriminating discussion of the exceptions to the maxim of the law of sales, *nemo dat quod non habet*, including the case of the agent who is intrusted with possession of his principal's property, and with the indicia of ownership, or of authority to sell. Such was the case in Columbus Buggy Co. v. Turley, 73 Miss. 529, 19 South. 232, 32 L. R. A. 260, 55 Am. St. Rep. 550 (1895), where the proprietor of a livery and sale stable was intrusted with carriages for sale, which he wrongfully sold for his own debts. Compare Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195 (1851), in which a carriage was left for repair with a carriage maker, and by him sold contrary to instructions. See, also, Parry Mfg. Co. v. Lowenberg, 88 Miss. 532, 41 South. 65 (1906); Gilman Oil Co. v. Norton, 89 Iowa, 434, 56 N. W. 663, 48 Am. St. Rep. 400 (1893).

not through Clark, the alleged agent. They were so delivered upon written orders, signed by the defendant, addressed to the plaintiff, and giving the description, quantity and prices of the goods desired. These orders were solicited and forwarded by Clark, who was the plaintiff's agent for that purpose and was to have a commission upon sales so made. Whether he was authorized to make contracts of sale and to receive payments or to make agreements as to the mode of payment was in dispute upon the conflicting testimony of the parties. Unless he had such authority or was held out by the plaintiff as having such authority, his receipt of, or agreement to receive, in payment, other goods, by way of barter, would not bind the plaintiff, and he may recover for the goods in this action. Upon the face of the orders upon which the goods were delivered, the price is payable in money to the plaintiff.

The first instruction given to the jury seems to us exceptionable, because not properly adapted to the facts of the case. There was no evidence that the goods were delivered to the defendant by Clark upon a contract for the same made by himself, as agent of the plaintiff, or otherwise. It was in dispute whether the contract of sale was made by Clark, as agent, or by the plaintiff directly; but the delivery, as the case is reported, was not made by Clark; and it was made by the plaintiff, not upon any verbal contract with Clark, but upon the defendant's written order, addressed to the plaintiff himself. The case therefore differs essentially from Brigham v. Palmer, 3 Allen, 450. The facts indicate a contract of purchase and sale with the plaintiff directly, and not with the agent. Finch v. Mansfield, 97 Mass. 89.

The second instruction is erroneous in itself. A commission, allowed to one who solicits orders, upon sales effected through such orders, does not constitute him or prove him to be an agent with authority to make absolute contracts of sale;[62] much less to receive payments, and make agreements to receive payments in other goods by way of barter. As we understand the instruction, it was that an agreement to give Clark a commission on goods sold through his solicitation made or proved him to be an agent to sell said goods. This instruction, taken with the previous one, rendered a verdict for the defendant almost inevitable. For these reasons, a new trial should be had.

There was evidence tending to show that, either by previous authority or by subsequent acquiescence, the plaintiff sanctioned the

[62] Compare Levi v. Booth, 58 Md. 305, 42 Am. Rep. 332 (1882), and Smith v. Clews, 105 N. Y. 283, 11 N. E. 632, 59 Am. Rep. 502 (1887). Certainly one formerly authorized to "solicit orders" has no authority to sell. Abrahams v. Weiller, 87 Ill. 179 (1877). Nor can authority to sell specified property confer power to sell after acquired property. Union Trust Co. v. Means, 201 Pa. 374, 50 Atl. 974 (1902); Blackmer v. Summit Coal & Mining Co., 187 Ill. 32, 58 N. E. 289 (1900). Nor property of another kind. McCord Co. v. Wollpett, 89 Cal. 271, 26 Pac. 969 (1891); Forrest v. Vanderbilt, 107 Fed. 734, 46 C. C. A. 611, 52 L. R. A. 473 (1901) (agent to sell yacht, sold launch).

mode of dealing adopted by Clark. But it does not appear that the verdict was rendered on that ground, and no question is now open before us in relation to it. Exceptions sustained.

SCUDDER v. ANDERSON.

(Supreme Court of Michigan, 1884. 54 Mich. 122, 19 N. W. 775.)

CAMPBELL, J.[63] Plaintiff, as vendee of John Scudder, brought this action in trover for the conversion of various articles formerly owned by the Marquette & Pacific Rolling-Mill Company, and used on their mining property in Marquette county. This company had, up to 1878, worked an iron mine on 40 acres of their own, and an adjoining 40 acres in which they owned seven sixteenths in fee, and had a lease of the other undivided interest. In October, 1877, a levy of execution on their landed mining property was carried to a sale, one Ward being the purchaser. On the third day of September, 1878, William W. Wheaton, who was general agent in charge of the company's interest, sold the property in suit here to John Scudder, in payment of a claim, which Scudder then held against the company for his services as secretary, to the amount of about $1,800. In August, 1879, defendant, who was sheriff of Marquette county, levied on this property under claim of legal process against the company, and sold it.

This case came on for trial, and the plaintiff recovered judgment. Various errors are assigned, relating chiefly to questions of title. Some other objections were also argued, which will be referred to. A point was made that sufficient evidence was not given of Wheaton's authority to sell. But, if this property was movable property, we can see no reason to doubt the power of a general agent and manager to dispose of it. Purchases and sales of personalty for use about mining premises must be of frequent occurrence, and would presumably be under the control of the general manager.[64] The point was not strenuously pressed. We think it was not well taken. * * * Affirmed.

[63] Part of the opinion is omitted.

[64] Authority to buy things and have them charged is in no sense authority to sell the principal's property. Moffet v. Moffet, 90 Iowa, 442, 57 N. W. 954 (1894). But when an agent is put in such a position that a sale is necessary to protect the property, authority to sell may be inferred. Sherry Lumber Co. v. Wis. Cent. R. Co., 37 Ill. App. 593 (1891).

(B) To Make Warranties

HERRING v. SKAGGS.

(Supreme Court of Alabama, 1878. 62 Ala. 180, 34 Am. Rep. 4.)

Action for damages for breach of a warranty by a sales agent that a safe was burglar proof. The safe had been broken open and rifled of a sum of money and other valuables.

STONE, J.[65] In Skinner v. Gunn, 9 Port. 305, speaking of the power of an agent to bind his principal, this court said: "The power in this case is to sell and convey the negro in the name of the plaintiff, and the agent must, as an incident of that power, and in the absence of any prohibition, have the right to warrant the soundness of the slave, as that is a usual and ordinary stipulation in such contracts, and must therefore be implied to effectuate the object of the power." The court, in the same case, had said, "An authority to do an act, must include power to do every thing usual and necessary to its accomplishment." This doctrine was reaffirmed in Gaines v. McKinley, 1 Ala. 446, and in Cocke v. Campbell, 13 Ala. 286. It will be observed that, in these cases, the court states, as matter of law, that power given to sell a slave carried with it power to warrant his soundness, in the absence of prohibition. A similar principle is found in the books, in reference to the power of an agent to bind his principal, by warranty of the soundness of a horse he is authorized to sell. It is a "usual and ordinary stipulation in such contracts," say the courts. Perhaps the custom of such warranties is so general, and has prevailed so long, that it has come to be treated as judicial knowledge. Certainly it was not intended to be affirmed, that an agent with general powers of sale, has unlimited power to bind his principal, by any and every stipulation the various phases of traffic may be made to assume. If so, the words, "in the absence of prohibition," found in the case of Skinner v. Gunn, supra, are meaningless and powerless.

In the case of Fisher v. Campbell, 9 Port. 210, a question arose on the implied power of an agent to bind his principal. That was the case of a non-resident planter, whose overseer in charge made purchases of supplies for the plantation and hands. It was proved that the employer had given the overseer instructions to purchase pork for his slaves from a particular mercantile house at Montgomery, with whom he had made arrangements for that purpose, and had given him no directions to buy any where else, nor had he any authority to purchase from any other person. The plantation was in Lowndes county, and, the roads being bad, the overseer purchased pork in his own county, much nearer to him, and at Montgomery prices. Commenting on a charge requested by plaintiffs, and refused by the court

[65] Part of the opinion is omitted.

below, this court said, "The last branch of the charge is stated as a corollary from the preceding propositions; 'that any special directions given to McMay [the overseer] by the defendant, as to the place of purchasing, was wholly immaterial as to this purchase, unless from the evidence they were satisfied that plaintiffs were informed at the time of such sale of such special directions; and that without this information, the plaintiffs would be entitled to recover, if the proof was fully made out.' We understand the law to be the exact converse of this proposition. When a person deals with one who professes to be the agent of another person, the person contracting with him is bound to know the extent of his authority."—See, also, McCrary v. Slaughter, 58 Ala. 230.

'We are not prepared to assent to the doctrine, in unlimited sense, that a general agent to sell has, by virtue thereof, the power to bind his principal by every species of warranty a purchaser may exact. In Benjamin on Sales, § 624, is the following language: "Warranties are sometimes given by agents, without express authority to that effect. In such cases the question arises as to the power of an agent, who is authorized to sell, to bind, his principal by a warranty. The general rule is, as to all contracts including sales, that the agent is authorized to do whatever is usual to carry out the object of his agency, and it is a question for the jury to determine what is usual. If in the sale of the goods confided to him, it is usual in the market to give a warranty, the agent may give that warranty in order to effect a sale." We fully approve and adopt this language of this very accurate writer. We do not intend, however, to overturn the doctrine declared in Skinner v. Gunn, and Cocke v. Campbell, supra. As a general rule, the agent has power to do whatever is usual—to enter into such express stipulations as are usual and customary—in effecting such sales.

What stipulations are usual and customary in effecting such sales, is not always matter of judicial knowledge. It is declared in the sales of slaves and horses to be within the knowledge of the court that it is usual to give warranties. It can not be affirmed that such custom exists in the sale of all chattels. Generally, and we hold in a sale like the present, "it is a question for the jury to determine what is usual." This, in the absence of express authority in the agent to warrant; for if the agent had such express authority, then his act is the act of his principal. And, in the absence of express authority, the question arises, and it is one for the jury, whether such warranty is customary in the sale of safes. If the jury, on the evidence, find there was such custom, then the principal is bound, "in the absence of prohibition" resting on the agent, and brought to the knowledge of the purchaser, to the same extent as if the principal had himself given the warranty. On the other hand, if there was no such authority given, and no such custom found to exist, then the principal would not be bound. True, if the principal ratified the act of such agent, although

the act itself had been unauthorized, this would bind the principal. But the receipt of the purchase money would have no such effect, unless received or retained with knowledge that the agent had given the warranty.

The sale in the present case was made by an agent. In the absence of proof of express authority to warrant, it was incumbent on the plaintiff to show a custom in the sale of safes, to warrant them as burglar proof. Either the express authority, or the authority implied from such proven custom, would constitute the act of the agent the act of the principal; but the law does not imply the authority from the fact that Stewart, who conducted the sale, was a general agent. The third count of the complaint avers that the defendants "did employ an agent, and authorized him to sell such safes, and did hold him forth to the public residing in and about the town of Talladega, Alabama, and elsewhere, as their general agent for the sale of iron safes." This is the entire averment of authority, and we hold it insufficient. It should have been averred that the agent had authority to make the warranty. Being averred, proof of express authority, or custom to warrant, would have sustained the averment.[66] The third count is insufficient, and the demurrer to it should have been sustained.

Under the principles above declared, it became a material inquiry whether Stewart had express authority to warrant the safe as burglar-proof. He should have been permitted to prove he had not such express authority. True, this would not necessarily exonerate the defendants. It would bear on only one phase of the inquiry; for, if such warranties are usual and customary in the sale of iron safes, then even a prohibition of such authority to the agent would amount to nothing, unless knowledge of such prohibition was carried home to the purchaser before the sale was consummated. So, if the published descriptive pamphlet with which the agent was furnished, tended to disclose what classes of safes were, and what were not represented as burglar-proof, and such pamphlet was exhibited to the purchaser pending the negotiation, then that pamphlet should have been allowed to go to the jury, as shedding some light on the controverted question of warranty vel non. * * *

For these and other reasons, reversed and remanded.

[66] While an agent of a manufacturer may warrant goods to be free from latent defects due to the process of manufacture, and that they are suitable for the purpose for which they were specifically designed, he has no authority, in the absence of express authority or usage of the trade, to warrant goods to be "all wool." Ellner v. Priestley, 39 Misc. Rep. 535, 80 N. Y. Supp. 371 (1902). Nor does authority to warrant goods extend to goods sold subsequent to the warranty. Wait v. Borne, 123 N. Y. 592, 25 N. E. 1053 (1890); Ide v. Brody, 156 Ill. App. 479 (1910).

Three isolated instances of sales with warranties made in three or four years are not sufficient to establish a usage of trade to warrant. Herring v. Skaggs, 73 Ala. 446 (1882).

BRADY v. TODD.[67]

(Court of Common Pleas, 1861. 9 C. B. N. S. 592, 7 Jur. N. S. 827, 30 L. J. C. P. 223, 4 L. T. Rep. N. S. 212, 9 W. R. 483, 99 E. C. L. 592.)

ERLE, C. J. Upon this rule to set aside the verdict for the plaintiff and enter it for the defendant on the plea denying the warranty of a horse, the question has been whether the warranty by the defendant was proved. The jury have found that Greig, in selling the horse for the defendant, warranted it to be sound and quiet in harness. The defendant stated, and it must on this motion be taken to be true, that he did not give authority to Greig to give any warranty. The relevant facts are, that the plaintiff applied to the defendant, who is not a dealer in horses, but a tradesman with a farm, to sell the horse; and that the defendant sent his farm-bailiff, Greig, with the horse, to the plaintiff, and authorized him to sell it for thirty guineas.

The plaintiff contends that an authority to an agent to sell and deliver imports an authority to him to warrant.

The subject has been frequently mentioned by judges and text-writers; but we cannot find that the point has ever been decided. It is therefore necessary to consider it on principle.

The general rule, that the act of an agent does not bind his principal unless it was within the authority given to him, is clear. But

[67] Followed in Cooley v. Perrine, 41 N. J. Law, 322, 32 Am. Rep. 210 (1879), in which it is said by the court: "A sale of a chattel is a transfer of its title by the vendor to the vendee for a price paid or promised. 1 Parsons on Contracts, 519. A direction to sell, therefore, nothing more appearing, would confer upon a special agent no authority beyond that of agreeing with the purchaser in regard to these component particulars. Under certain circumstances a sale legally imports more than these particulars, and in such cases the authority under a power to sell would be correspondingly enlarged. Thus, if a sale be made by sample, it is thereby impliedly warranted that the bulk is of as good a quality as the sample. Hence it has been properly held that where a broker was empowered to sell goods which were in bulk, and by the custom of brokers, it was permissible to sell such goods by sample, and he was not restricted by his instructions as to the mode of sale, his sale by sample, and the warranty of quality therein implied, were binding upon his principal. The Monte Allegre, 9 Wheat. 616, 6 L. Ed. 174; Andrews v. Kneeland, 6 Cow. 354; Schuchardt v. Allen, 1 Wall. 359, 17 L. Ed. 642. But in a sale of a horse, subject to the buyer's inspection, no warranty of quality is implied, and it seems a short and clear deduction of reasoning thence to conclude that in an authority to make such a sale, no authority so to warrant is implied. The warranty is outside of the sale, and he who is empowered to make the warranty must have some other power than that to sell. * * * Nor have they any better basis on principle than on authority. Their underlying principle is said to be that the agent, being empowered to sell, is intrusted with all powers proper for effectuating the sale, and a warranty of quality is both a proper and a usual power for that purpose. If by this were meant that the agent is intrusted with all powers proper to the making of an effectual sale, its accuracy could not be questioned. Undoubtedly his authority extends to whatever is proper to be done in fixing the price, and the time and mode of payment, and the time and mode of vesting the title and delivering the chattel. All these things are incident to the sale. But if the expression mean that the agent is intrusted with all powers convenient for the purpose of inducing the purchaser to buy, even to the extent of enabling

the plaintiff contended that the circumstances created an authority in the agent to warrant, on various grounds,—among others, he referred to cases where the agent has by law a general authority to bind his principal, though as between themselves there was no such authority, such as partners, masters of ships, and managers of trading business; and stress was laid on the expressions of several judges, that the servant of a horse-dealer or livery-stable keeper can bind his master by a warranty, though, as between themselves, there was an order not to warrant: see Helyear v. Hawke, 5 Esp. N. P. C. 72, Alexander v. Gibson, 2 Campb. 555, Fenn v. Harrison, 3 T. R. 757. We understand those judges to refer to a general agent employed for a principal to carry on his business, that is, the business of horse-dealing; in which case there would be by law the authority here contended for. But the facts of the present case do not bring the defendant within this rule, as he was not shown to carry on any trade of dealing in horses.

It was also contended that a special agent, without any express authority in fact, might have an authority by law to bind his principal; as, where a principal holds out that the agent has such authority, and induces a party to deal with him on the faith that it is so. In such a case the principal is concluded from denying this authority, as against the party who believed what was held out, and acted on

him to make collateral contracts to that end, then I think it is in violation of the settled rule that the special agent must be confined strictly to his express authority, and is in opposition to well-considered and authoritative decisions. For example, it might very much facilitate the sale if the agent could endorse the vendee's note for the purpose of raising the money to pay the price, and such an exercise of power would jeopardize the principal no more than would a sale on credit, and very much less than might a warranty of quality; and yet I imagine that a special agent could not make such an endorsement binding on his employer, for in Gulick v. Grover, 33 N. J. Law, 463, 97 Am. Dec. 728, the Court of Errors held that even a general agent had no authority so to endorse, to enable his principal's debtor to borrow money to pay the debt. So in Upton v. Suffolk County Mills, 11 Cush. 586, 59 Am. Dec. 163, it was adjudged that even a general agent for the sale of flour could not warrant that it would keep good during a voyage to California. And in Bryant v. Moore, 26 Me. 84, 45 Am. Dec. 96, a warranty of oxen by a special agent empowered to exchange, was held invalid against the principal. Likewise, in Lipscomb v. Kitrell, 11 Humph. 256, it was decided that an authority to sell a claim confers no authority to guarantee it—that such a guaranty is not a necessary incident of the sale; and a similar conclusion was reached as to bank stock, in Smith v. Tracy, 36 N. Y. 79."

Another portion of this opinion may be found on p.170.

Cf. Dennis v. Ashley, 15 Mo. 453 (1852), in which giving a warranty is held to be a usual means of making a sale, citing especially Benson, J., in Nelson v. Cowing, 6 Hill (N. Y.) 338 (1844). But in Smith v. Tracy, 36 N. Y. 79 (1867), this is denied as to a special authority to sell particular property, and in the leading case of Wait v. Borne, 123 N. Y. 592, 25 N. E. 1053 (1890), the implied power of an agent to warrant quality is limited to cases where a usage to warrant can be shown. The distinction between usual and unusual warranties is further brought out in Reese v. Bates, 94 Va. 321, 26 S. E. 865 (1897). The question of whether a warranty is usual in a particular trade is in general for the jury upon the evidence. Dingle v. Hare, 7 C. B. N. S. 145, 97 E. C. L. 145 (1859).

it: see Pickering v. Busk, 15 East, 38, ante, p. 319. But the facts do not bring the defendant within this rule.

The main reliance was placed on the argument that an authority to sell is by implication an authority to do all that in the usual course of selling is required to complete a sale; and that the question of warranty is in the usual course of a sale required to be answered, and that therefore the defendant by implication gave to Greig an authority to answer that question, and to bind him by his answer. It was a part of this argument that an agent authorized to sell and deliver a horse is held out to the buyer as having authority to warrant. But on this point also the plaintiff has in our judgment failed.

We are aware that the question of warranty frequently arises upon the sale of horses; but we are also aware that sales may be made without any warranty or even an inquiry about warranty. If we laid down for the first time that the servant of a private owner intrusted to sell and deliver a horse on one particular occasion is therefore by law authorized to bind his master by a warranty, we should establish a precedent of dangerous consequence: for, the liability created by a warranty extending to unknown as well as known defects, is greater than is expected by persons unexperienced in law; and, as everything said by the seller in the bargaining may be evidence of warranty to the effect of what he said, an unguarded conversation with an illiterate man sent to deliver a horse may be found to have created a liability which would be a surprise equally to the servant and the master. We therefore hold that the buyer taking a warranty from such an agent as was employed in this case, takes it at the risk of being able to prove that he had the principal's authority: and, if there was no authority in fact, the law from the circumstances does not in our opinion create it.

When the facts raise the question it will be time enough to decide the liability created by such a servant as a foreman alleged to be a general agent, or such a special agent as a person intrusted with the sale of a horse in a fair or other public mart, where stranger meets stranger, and the usual course of business is for the person in possession of the horse, and appearing to be the owner, to have all the powers of an owner in respect of the sale. The authority may under such circumstances as are last referred to be implied, though the circumstances of the present case do not create the same inference. It is unnecessary to add, that, if the seller should repudiate the warranty by his agent, it follows that the sale would be void, there being no question raised upon this point.

Judgment for the defendant.

WESTURN v. PAGE.

(Supreme Court of Wisconsin, 1896. 94 Wis. 251, 68 N. W. 1003.)

Action for damages for breach of warranty of a horse, traded to plaintiff by defendant's agent, Hall.

MARSHALL, J. One question, only, is necessary to be decided in the determination of this appeal; that is, did the trial court err in instructing the jury, in substance, as follows: If Mr. Hall, the defendant's agent, made an agreement of warranty respecting the soundness of the horse, the defendant is bound by it, because he gave Hall [68] full authority to sell or exchange the horse. Plaintiff had a right to rely upon the authority of Hall in making whatever agreement was made as part of the agreement or sale.

We assume that the learned trial judge relied on Boothby v. Scales, 27 Wis. 626, where this court decided that general authority to an agent to sell includes power to sell with warranty, unless the purchaser knows the private instructions to the agent, or that he is exceeding his powers, overlooking the fact that such case has been repeatedly overruled in subsequent cases. In Pickert v. Marston, 68 Wis. 465, 32 N. W. 550, 60 Am. Rep. 876, the subject was discussed at length, and the general rule, laid down by standard text writers, and supported by the great weight of authority, was there stated with approval, as follows: "The general rule is as to all contracts, including sales, that the agent is to do whatever is usual to carry out the object of his agency, and it is a question for the jury to determine what is usual. If, in a sale of the goods confided to him, it is usual in the market to give a warranty, the agent may give that warranty in order to effect the sale." The subject was again before the court in Larson v. Aultman & Taylor Co., 86 Wis. 281, 56 N. W. 915, 918, 39 Am. St. Rep. 893. In the opinion of the court by Mr. Justice Cassoday, it is there said: "The rule is well settled that the agent employed to sell has no implied power to warrant, unless the sale is one which is usually attended with warranty."

So, it comes to this: that, in order to make out a cause of action for breach of an express warranty of an article sold by an agent, it is incumbent upon the party seeking to enforce such warranty to prove express authority from the principal to make it, or that such sales are usually attended with such warranties; and the question of whether so usually attended or not is one for determination by the jury from the evidence. Roche v. Pennington, 90 Wis. 107, 62 N. W. 946; Pickert v. Marston, supra. In the light of the foregoing, the

[68] The agent may make himself liable on the warranty, or both himself and principal, but a recovery against one bars a right against the other. Dahlstrom v. Germunder, 198 N. Y. 449, 92 N. E. 106, 19 Ann. Cas. 771 (1910).

instruction under consideration is clearly erroneous, which must work a reversal of the judgment appealed from.

The judgment of the circuit court is reversed, and the cause remanded for a new trial.

CONKLING v. STANDARD OIL CO.

(Supreme Court of Iowa, 1908. 138 Iowa, 596, 116 N. W. 822.)

Action for damages. Verdict and judgment for plaintiff. Defendant by its agent sold plaintiff Polar Ice Oil for use on his automobile, under warranty, as plaintiff claimed, that it was not inflammable or capable of combustion, and that it was absolutely safe to be used as a cooling medium. The next day the oil caught fire and his machine was burned and destroyed.

BISHOP, J.[69] * * * On the question of the authority of the selling agent of defendant to warrant the oil sold to plaintiff but little need be said. We grant to counsel for appellant that there is no evidence in the record of authority granted in terms. And we may concede for the purpose of the case that, by general rule, a bare authority to sell does not carry with it by implication authority to warrant. But an essential attribute to every agency "is the power to do all that is usual and necessary to accomplish the object for which the agency was created." Mechem on Agency, § 347. And every one knows that the manufacturer of goods who employs sales agents puts his goods into the hands of such agents to be sold. So, where goods are designed for a particular purpose, and therefore to appeal to a particular trade, he naturally expects his agents to make known that purpose, and to represent to proposing purchasers that the goods are adapted to and can be safely used for such purpose.

Accordingly it must be presumed that that which he expects to be done, and without which the object of the agency could not adequately be accomplished, he has authorized to be done. And especially this should be the rule where the article offered for sale is of such a character as that the proposing purchaser cannot be expected in reason to have knowledge of the properties thereof, and must rely upon the superior knowledge and skill of the manufacturer and those who represent him. Moreover, as we shall see presently, the law will imply a warranty in the case of a sale so made, and it would be illogical, at least, to permit a principal to say he did not authorize that which the law attaches as a consequence to the very act the agent was employed to do. As defendant was the manufacturer of the oil in question, and knew the properties thereof as plaintiff could not know, and as it was carrying such oil in stock to be sold by its agent in charge as a cooling

[69] Part of the opinion is omitted.

medium for gasoline engines, we do not think it is in any position to deny the authority of such agent to make representation of the purpose of the oil and that it could be safely used for that purpose. * * *

Judgment affirmed.

UPTON v. SUFFOLK COUNTY MILLS.

(Supreme Judicial Court of Massachusetts, 1853. 11 Cush. 586, 59 Am. Dec. 163.)

Assumpsit for breach of warranty that flour should keep sweet during the voyage to California.

METCALF, J. The court have not found it necessary to form an opinion upon a question which was ably argued, namely, whether the contract declared on legally purports to be a contract between the plaintiff and the defendants. Assuming that it does, yet we are all of opinion that the defendants are not bound by it, because Allcott had no authority to bind them by such contract. It appears from his testimony that he was their general selling agent, and had no special instructions in regard to making sales; that no authority (by which he doubtless means express authority) was ever given to him by the defendants to make such a warranty as that on which this action is brought; that no extra price was paid for the flour by reason of the warranty; that though the sale was entered on the defendants' books, yet that the warranty was not entered there; and that the defendants had no notice of the warranty until they were called upon by the plaintiff to answer for a breach of it.

The single question which we have examined is, what is the extent of the implied authority of a general selling agent? The answer is, it is the same as that of other general agents. And it is an elementary principle that an agent, employed generally to do any act, is authorized to do it only in the usual way of business. Smith's Merc. Law (Am. Ed. 1847) 105 (5th Ed.) 129; Woolrych on Com. & Merc. Law, 319; Jones v. Warner, 11 Conn. 48. A general agent is not, by virtue of his commission, permitted to depart from the usual manner of effecting what he is employed to effect. 3 Chit. Law of Com. & Man. 199. When one authorizes another to sell goods, he is presumed to authorize him to sell in the usual manner, and only in the usual manner, in which the goods or things of that sort are sold. Story on Agency, § 60. See also Shaw v. Stone, 1 Cush. 228. The usage of the business in which a general agent is employed furnishes the rule by which his authority is measured. Hence, a general selling agent has authority to sell on credit, and to warrant the soundness of the article sold, when such is the usage. Goodenow v. Tyler, 7 Mass. 36, 5 Am. Dec. 22; Alexander v. Gibson, 2 Campb. 555; Nelson v. Cowing, 6 Hill (N. Y.) 336; 2 Kent, Com. (6th Ed.) 622; Russell on Factors, 58; Smith on Master and Servant, 128, 129. But as stocks

and goods sent to auction are not usually sold on credit, a stock broker or auctioneer has no authority so to sell them, unless he has the owner's express direction or consent. Wiltshire v. Sims, 1 Campb. 258; 3 Chit. Law of Com. & Man. 205; 1 Bell, Com. 388. And it was said by Mr. Justice Thompson (The Monte Allegre, 9 Wheat. 647, 6 L. Ed. 174) that auctioneers have only authority to sell and not to warrant, unless specially instructed so to do.

As there is no evidence nor suggestion of a usage to sell flour with the hazardous warranty that it shall keep sweet during a sea voyage, in which it must twice cross the equator, we deem it quite clear that nothing short of an express authority, conferred on Allcott by the defendants, would empower him to bind them by such a warranty. See Cox v. Midland Counties Railway Company, 3 Welsb. Hurlst. & Gord. 278.

Plaintiff nonsuit.

(C) To Fix Terms

DAYLIGHT BURNER CO. v. ODLIN.

(Supreme Judicial Court of New Hampshire, 1871. 51 N. H. 56, 12 Am. Rep. 45.)

Action against the defendant as a common carrier for delivering goods marked C. O. D. without being paid for the same. The goods had been sold on credit to one Berry by Moore, a traveling agent of plaintiff, empowered to sell on commission. Defendant refused to deliver until Berry brought an order from Moore to deliver "without C. O. D." Verdict for defendant.

BELLOWS, C. J. From the uncontradicted testimony of the plaintiff and the finding of the jury, it may be assumed that Moore was clothed by the plaintiff with an apparent authority, like that of a factor, to sell all the goods of the plaintiff he could sell within his business circuit, on a commission of ten per cent.

As incident to that general authority, he had power to fix the terms of sale, including the time, place, and mode of delivery, and the price of the goods, and the time and mode of payment, and to receive payment of the price, subject of course to be controlled by proof of the mercantile usage in such trade or business.

There is some conflict in the adjudged cases upon the question of the authority of a factor to sell on credit, but we think the weight of modern authority is in favor of the position that he may sell on credit, unless a contrary usage is shown. Goodenow v. Tyler, 7 Mass. 36, 5 Am. Dec. 22; Hapgood v. Batcheller, 4 Metc. (Mass.) 576; Greely v. Bartlett, 1 Greenl. 178, 10 Am. Dec. 54; Van Alen v. Vanderpool, 6 Johns. 70, 5 Am. Dec. 192; Robertson v. Livingston, 5 Cow. 473; Douglass v. Leland, 1 Wend. 490. And see 1 Am. Lead. Cases (4th Ed.) 662, note, where it is said that it is universally established as the

law-merchant that a factor may sell on credit. So is Laussatt v. Lippincott, 6 Serg. & R. 386, 9 Am. Dec. 440, and May v. Mitchell, 5 Humph. 365, and Story on Agency, § 209.

The same views are recognized in Scott v. Surman, Willes, 406: Russell v. Hankey, 6 T. R. 12; Haughton v. Mathews, 3 B. & P. 489, per Chambre, J.; 3 Selw. N. P. 719.

In the case before us, Moore stands much on the same footing as a factor. The most marked distinction is, that he is a travelling merchant, and did not apparently have his principal's goods with him; but this, we think, cannot affect the rule.

The reason of that rule in the case of factors is, that it is found, by experience and repeated proofs in courts of justice, that it is ordinarily the usage of factors to sell on credit; and the same reason will apply in this case.

We have a case, then, where the agent was apparently clothed with the authority to sell the plaintiff's goods, without limitation as to the quantity, and on commission, for cash or on credit as he might think proper; and this being so, Moore must be regarded, in respect to third persons, as the plaintiff's general agent, whose authority would not be limited by instructions not brought to the notice of such third persons. Backman v. Charlestown, 42 N. H. 125, and cases cited.

As Moore, then, in respect to third persons, had the power to sell on credit, the authority to control the delivery of the goods so sold and sent to his order, for the purpose of making it conform to the contract of sale, would necessarily come within the scope of his agency; and we think his order to the defendant would justify a delivery of the goods without payment, unless he had notice of the agent's want of authority. As to him the agent's apparent authority was real authority.[70]

The marking of the package by another agent of the plaintiff, to the effect that cash was required on delivery, was not in law notice of such want of authority, although it might be sufficient to put the defendant upon inquiry. That, however, was properly left to the jury, and they have found it not to be sufficient for that purpose. The marking of the package in that way does not necessarily imply that the agent had no authority to sell on credit, but it might indicate merely that the person so marking it supposed the sale to be for cash. And it might well be considered to come within the scope of Moore's agency to make the delivery conform to the contract of sale.

As the defendant, therefore, is found to have had no notice of any want of authority in Moore, and was not put upon inquiry, there must be:

Judgment on the verdict.

[70] When the agent is authorized to sell on credit he may take a promissory note in his own name, if he exercised reasonable care, and not be answerable to the principal for the value of the goods sold if the maker becomes bankrupt. Goodenow v. Tyler, 7 Mass. 36, 5 Am. Dec. 22 (1810).

STIRN v. HOFFMAN HOUSE CO.

(Common Pleas of New York, City and County, General Term, 1894. 8 Misc. Rep. 246, 28 N. Y. Supp. 724.)

BISCHOFF, J.[71] Plaintiff sued, as the assignee of the claim of L. Somborn & Co., to recover the fair and reasonable value of the champagnes sold and delivered to the defendant. The answer denied generally the sale and delivery, besides pleading payment and an offset against the plaintiff's assignors growing out of discounts on former purchases, to which the defendant claimed to be entitled by agreement with Somborn & Co.'s agent. On the trial, Julius Somborn, a member of the firm of Somborn & Co., called as a witness for the plaintiff, testified to the fact of the sale and delivery of champagnes of the fair and reasonable value of $232 to the defendant. This testimony not only remained wholly uncontradicted, but was conceded by the defendant's president, Stokes, to be true; and the defendant's efforts on the trial were confined to the proof of an agreement with Somborn & Co.'s agent that the defendant should be allowed a discount of 10 per cent. of its purchases, the aggregate amount of the discounts claimed being $320.13. There was abundant testimony for the defendant to the effect that an agreement to allow the discounts was in fact made by Somborn & Co.'s general salesman with the defendant's president some time before the purchases on which it was claimed were made.

Both parties asked for the direction of a verdict—the plaintiff for the amount of his claim, the defendant for the amount of its offset. The trial justice intimated his intention to grant the defendant's motion, whereupon the plaintiff's counsel requested submission of the case to the jury. This was denied, and an exception taken to the denial. A verdict was thereupon directed for the defendant for $67.13, the excess of the defendant's claim against the plaintiff's assignors, to which direction plaintiff's counsel again excepted. On appeal to the general term below from the judgment entered on the verdict the court reduced the defendant's recovery to an amount equal to the plaintiff's claim, and, as so modified, affirmed the judgment. * * *

The only question of law which is urged by counsel for the appellant to have arisen on the facts in evidence, and relating to the defendant's claim against the plaintiff's assignors, is whether or not a general salesman employed by a firm of merchants to sell its wares has implied authority to fix the price and terms upon a sale. The affirmative of that proposition admits of no successful dispute. The employment of the agent is the measure of his authority, and one employed to sell, inferentially, therefore, has authority to fix the price and adjust the terms of the sale, for without the last-mentioned au-

[71] Part of the opinion is omitted.

thority all other authority would be of no avail. "An agent authorized to sell either real or personal estate may enter into a contract within the terms of his authority, which will bind his principal. This is of the very essence of the authority given—an authority to sell. That he can bind his principal by a formal contract is the doctrine of the books from the earliest law on the subject" (Haydock v. Stow, 40 N. Y. 363, 368); and, we may add, that without a price and terms there could be no contract of sale. It is conceded that, if the agent has departed from the instructions of his principal, to the purchaser's knowledge, the principal will not be bound; but whether or not the defendant or its officers knew that Somborn & Co.'s salesman had no authority to stipulate for the discounts claimed on the trial was a question of fact, which we must assume to have been determined by the trial justice in the defendant's favor.

But one alleged error in ruling on the trial is urged by counsel for appellant, namely, the admission of the testimony of the defendant's witness Cornish as to the amount of the discount claimed by defendant. It is sufficient to say that no exception appears to have been taken to the ruling. Judgment affirmed, with costs.

PAYNE v. POTTER.

(Supreme Court of Iowa, 1859. 9 Iowa, 549.)

Replevin for a horse. Judgment for plaintiff and defendant appeals.

STOCKTON, J.[72] The first assignment of error is upon the charge of the court. The rule of law is that no man is bound by the act of another, without or beyond his consent; and where an agent acts under a special or express authority, whether written or verbal, the party dealing with him is bound to know at his peril what the power of the agent is, and to understand its legal effect; and if the agent exceed the boundary of his legal power, the act, as concerns the principal, is void. Delafield v. State of Illinois, 26 Wend. 193; Story on Agency, § 165. The power must be pursued with legal strictness, and the agent can neither go beyond nor beside it. The act must be legally identical with that authorized to be done or the principal is not bound. 1 Am. Lead. c. 544, 545, note to Rossiter v. Rossiter. So it is held that an agent to whom a horse is given to sell for the principal, cannot deliver him in payment of his own debt, and the owner may recover the horse from a purchaser to whom he has been so delivered. Parsons v. Webb, 8 Greenl. 38, 22 Am. Dec. 220.

And it is held that a special authority or direction to sell, does not authorize a sale on credit, unless commercial custom has given rise

[72] Part of the opinion is omitted.

to such an understanding in some particular business. The question whether in such case a discretion to sell on credit is given, must depend on the authority in the particular case.[78] In May v. Mitchell, 5 Humph. 365, a principal delivered to an agent three mules to be taken to the southern market, and to be sold for the best price that he could get, and the proceeds to be returned; the agent took them to the south and sold them on credit, and the purchaser proved insolvent; it was held that the agent was vested with a discretionary power to sell upon the best terms that could be procured according to the course of trade in that part of the country to which the mules were carried, and as this was proved to be on credit, the agent was held not to be liable to the principal.

Every general power necessary implies the grant of every matter necessary to its complete execution. Peck v. Harriott, 6 Serg. & R. 146, 9 Am. Dec. 415. In the absence of special instruction to the contrary, and in the absence of such prescription as to the manner of doing the act, as implies an exclusion of any other manner, an authority or direction to do an act, or accomplish a particular end, implies and carries with it authority to use the necessary means and inducements, and to execute the usual legal and appropriate measures proper to perform it. And not only are the means necessary and proper for the accomplishment of the end included in the authority; but also, all the various means which are justified or allowed by the usages of trade. Thus (says Judge Story) if an agent is authorized to sell goods, this will be construed to authorize the sale to be made on credit as well as for cash, if this course is justified by the usages of trade, and the credit is not beyond the usual period. Story on Agency, § 60.

We think it results from the rules above laid down that the burden lay upon the defendant to show that the sale by the agent on credit was justified by the usages of trade, and that the credit given was not unreasonable. Without such proof the authority of the agent could only be construed into an authority to sell for cash; and in this view there was no error in the charge of the court to defendant's prejudice. * * *

Judgment reversed.

[78] A selling agent cannot, without special authority, resort to unusual and extraordinary means for carrying on his agency. Shaw v. Stone, 1 Cush. 228 (1848). But giving the third party a refusal for two days is not unusual or unreasonable. Meister v. Cleveland Dryer Co., 11 Ill. App. 227 (1882).

TAYLOR & FARLEY ORGAN CO. v. STARKEY.

(Supreme Court of New Hampshire, 1879. 59 N. H. 142.)

Trover for an organ which the agent, Davis, had traded for a buggy and $40 cash.

STANLEY, J. The contract between the plaintiffs and Davis was properly admitted. It was evidence of the agreement under which Davis was in possession, and tended to show that his authority was to sell, and not to exchange. In the absence of evidence to the contrary, to sell means to sell for cash.[74] Davis, having no authority except to sell for cash, could not lawfully exchange for other property, either in whole or in part (Story Agency, § 78), and if he did the title would not pass, for the plaintiffs did not hold Davis out, or authorize him to hold himself out, as owner of the organ. Holton v. Smith, 7 N. H. 446; Burnham v. Holt, 14 N. H. 367; Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195.

Judgment for the plaintiffs.

BROWN v. WEST.

(Supreme Court of Vermont, 1897. 69 Vt. 440, 38 Atl. 87.)

TYLER, J. In July, August, and September, 1892, the plaintiff was a retail merchant in Ludlow, in this state, and the defendants were wholesale grocers in Springfield, Mass. They had in their employment one Andrews, as a traveling salesman, who was under instructions from them to sell certain "limited goods," so called, according to price lists which they furnished him, and at no other prices, and to make collections and receipt bills in their name as rendered from their office. The defendants were under an express contract with the manufacturers of these goods not to sell them for less than the fixed prices. During this time Andrews sold the plaintiff several bills of goods, including some that were "limited," and subsequently settled with the plaintiff, and allowed him discounts as agreed upon at the time of sale. Only the last three consignments were in controversy here.

The plaintiff had no express knowledge of the defendants' instructions to Andrews. He knew that Andrews sold him these goods at list prices; that the orders therefor were sent to the defendants at list prices; and that the defendants rendered him bills at those prices; but he supposed that the defendants knew and assented to the deduc-

[74] The agent has no authority to sell for Confederate bonds unless they are circulating as money. Brown v. Smith, 67 N. C. 245 (1872). Nor to accept in payment advertising of the principal's wares on the building of the third person. Beck v. Donohue, 27 Misc. Rep. 230, 57 N. Y. Supp. 741 (1899). Nor to exchange the goods of his principal for other goods, even though he could make a sale in no other way. Block v. Dundon, 83 App. Div. 539, 81 N. Y. Supp. 1114 (1903).

tions, and that they adopted this method to evade their contract with the manufacturers.

The salesman clearly had no authority from his principal to sell the limited goods for less than the fixed prices; but the plaintiff contends that the defendants held Andrews out to the public as their general agent, and as having competent authority to make the sales, and that they are bound by his acts. This would be the rule applicable to the case if the plaintiff did not know and had no reason to believe that the salesman's authority was limited. It was said in Griggs v. Selden, 58 Vt. 561, 5 Atl. 504, ante, p. 300: "In determining the liability of the principal, the question is not what authority was intended to be given the agent, but what authority was a third person dealing with him justified from the acts of the principal in believing was given him."

No principle is better settled in the law, nor is there any founded on more obvious justice, than that if a person dealing with an agent knows that he is acting under a circumscribed and limited authority, and that his act is outside of and transcends the authority conferred, the principal is not bound; and it is immaterial whether the agent is a general or special one, because a principal may limit the authority of the one as well as that of the other. See Walsh v. Insurance Co., 73 N. Y. 10.

The plaintiff must have known of the defendants' contract with the manufacturers, for the referee finds that he supposed that the defendants' practice of rendering him bills in accordance with the price lists, and the agent making discounts on payment thereof, were understood methods of evading the defendants' contract with the manufacturers not to sell below fixed prices. He knew that the defendants rendered him bills for the goods ordered by him through the salesman at the list prices, and that the salesman collected the bills of him at less than those prices. These facts were sufficient to have put the plaintiff on inquiry as to the extent of the agent's authority to make discounts. He should have inquired of the defendants whether the salesman was acting under their authority in making the deductions, rather than have assumed that they were conniving to defraud the manufacturers.[75]

Judgment reversed, and judgment for defendants.

[75] But where the third person has no knowledge of the limits on the agent's authority to fix prices, the principal cannot repudiate the contract on the grounds alone that the price is too low. Mabray v. Kelly-Goodfellow Shoe Co., 73 Mo. App. 7 (1898). Cf. Sloan v. Brown, 228 Pa. 495, 77 Atl. 821, 139 Am. St. Rep. 1019 (1910), in which a telegram to the agent, "If can't sell, borrow," was held to be enough to put the third person on notice of limitation on the price, and Fulton v. Sword Medicine Co., 145 Ala. 331, 40 South. 393 (1906), in which the written order for the goods conveyed similar notice of the limits of the agent's authority. See, also, Seven Hills Chautauqua Co. v. Chase Bros. Co., 26 Ky. Law Rep. 334, 81 S. W. 238 (1904).

HOOK v. CROWE.

(Supreme Judicial Court of Maine, 1905. 100 Me. 399, 61 Atl. 1080.)

SAVAGE, J. Action to recover the price of two awnings and one sash curtain sold and delivered by the plaintiffs to the defendants. The agreed statement of facts shows that one Harry F. Hook, the selling agent of the plaintiffs, applied to the defendants for an order, and that the defendants gave an order for the articles mentioned, on condition that he (Harry F. Hook) would take the pay therefor in clothing and work out of defendants' store, which he agreed to do. On the same day Hook delivered to the plaintiffs an unsigned order for the awnings upon one of their printed blanks. The goods were shipped to the defendants seven days later and by them received. A bill for the same was sent to them by mail the same day. The plaintiffs took the order from their agent, Hook, without knowledge of the agreement which he had made with the defendants in regard to the manner of payment, and without notice or suggestion of payment otherwise than in cash as usual. On the day the original order was given the agent, Hook, had work done by the defendants to the mount of $1.50, and nearly a month later he had clothing of them to the amount of $8.50, all in accordance with his agreement with them when they gave the order for the awnings. The defendants now seek to have these items allowed against the bill sued by the plaintiffs. The court below gave judgment for the plaintiffs for the full amount of their bill, and the defendants took exceptions.

The case hinges upon whether the defendants at the time they gave the order knew that Hook was acting as agent for the plaintiffs, or whether they believed him to be a principal. For, whatever may be the implied authority of selling agents to make terms and provisions for payment, and however principals are bound generally by the conditions their agents agree to, we think it cannot be gainsaid that an agent has no implied authority, which binds the principal, to contract that payment may be made by goods to be sold or services to be rendered to him on his own personal account. The doctrine laid down in Parsons v. Webb, 8 Me. 38, 22 Am. Dec. 220, and also Rodick v. Coburn, 68 Me. 170, is analogous, and not distinguishable in principle. Persons dealing with an agent knowing him to be such, are bound to know that he has no such implied authority. If they deal with him upon such terms, they are bound to know that the principal will not be bound, unless he ratifies. Accordingly, if these defendants made such unauthorized agreement with the agent, knowing him to be such, and nevertheless received the goods ordered, they should pay for them. Although the contract with the agent was express, it was invalid as to the manner of payment. If under such circumstances the defendants chose to receive the goods, they affirmed the order

itself, and became liable to pay in cash.[76] In this respect this case is to be distinguished from Billings v. Mason, 80 Me. 496, 15 Atl. 59.

On the other hand, if the defendants dealt with Hook, the agent, believing him to be a principal, the plaintiffs, who were undisclosed principals, must take the contract, if they seek to enforce it, as their agent and the defendants left it. If they seek the advantages of the contract, they must suffer its burdens, and must allow the defendants by way of payment for the goods sold and services rendered to the agent.

As to whether or not the defendants knew Hook was acting as agent, the agreed statement of facts is vague and uncertain. It is true that Hook delivered to the plaintiffs a written, but unsigned, order. It is true that that order discloses on its face that the plaintiffs were the principals, and therefore that Hook was only an agent. But it does not appear satisfactorily, and we cannot find, that the defendants saw the written order or knew its contents, or that they were in any way informed that Hook was an agent, and not a principal. The case states that the defendants "did give the order sued for." But no order is "sued for." The suit is for the price of goods ordered, and unquestionably the defendants did give an order for the goods. The question is whether they gave the order which Hook delivered to the plaintiffs, and were so advised of its contents, and that plaintiffs were the principals. We think the plaintiffs' case on this point fails for want of proof.

The ruling of the court below, being in effect to the contrary, cannot be sustained. Exceptions sustained.

LEACH v. BEARDSLEE.

(Supreme Court of Errors of Connecticut, 1853. 22 Conn. 404.)

Case to recover the value of certain oxen delivered to defendant, and by him delivered in New York City, together with one of his own, and sold to butchers. Defendant took in payment a twenty day note, payable to himself. The butchers became insolvent. Verdict for defendant. Plaintiff moved for a new trial.

CHURCH, C. J. We infer from the verdict of the jury, that the claim of the plaintiff, that his instructions to the defendant were to sell for cash, and not on credit, was not sustained by the proof. This leaves the case, as it was submitted by the judge to the jury, in the charge, "that the implied undertaking of the defendant was, to sell the cattle, in the usual and customary manner."

The defendant claimed, that there was a well known usage and

[76] To the same effect is Baldwin v. Tucker, 112 Ky. 282, 65 S. W. 841, 23 Ky. Law Rep. 1538, 57 L. R. A. 451 (1901), containing an extensive and valuable review of the authorities; also, Wheeler & Wilson v. Givan, 65 Mo. 89 (1877); Holton v. Smith, 7 N. H. 446 (1835); Gorham v. Felker, 102 Ga. 260, 28 S. E. 1002 (1897).

custom in the city of New York, where this sale was to be made and was made, for drovers to sell, on short credit, and to receive notes, in their own names, for the price, and that he had conformed to this custom, in the sale of the defendant's cattle.

In the absence of clear stipulations in contracts, usage of trade or business is often proved, to show the actual intent and purpose of the parties, though not expressed. Such usage must be lawful and reasonable, and so certain and general, in the place where the business is to be done, or the contract performed, or among those engaged in such business, that the parties to the contract may reasonably be supposed to know it, and to act in reference to it. It such case, it may be taken, that the usage entered into, and became part of, the contract.

A general usage, affecting any branch of business, furnishes good evidence of what is regarded as right and reasonable, in that respect, and when it is conformed to, negligence or misconduct can not be imputed. Barber v. Brace, 3 Conn. 9, 8 Am. Dec. 149; Casco Mfg. Co. v. Dixon et al., 3 Cush. 408; Chitty, Con. 20; 1 Sw. Dig. 10.

Proof of the general usage, claimed by the defendant to exist in the city of New York, where the plaintiff intended the sale of his cattle should be made, furnished strong evidence, that he not only assented, but empowered his agent, the defendant, to sell on the usual credit, and in the usual manner. And, although commission merchants, in the absence of instructions or custom, must generally sell for cash, yet, if there be an usage modifying the course of business, in this particular, or in other respects, and the sale is made in the usual and customary way, the agency is legally performed. Story on Agency, §§ 60, 77, 96, 110, 189, 199, 209, 226; 2 Kent, Com. 622. The usage here offered to be proved, and which was proved, was not to contradict or control the terms of a contract definitely expressed, as it would have been, if positive instructions to sell for cash down, had been proved; but only to show the extent of the duty and obligation of the defendant, in a matter not thus expressed, but inferable from the nature of the business in which the defendant had long been engaged, and the well known manner in which such business had been usually conducted. Usage can not control or vary the clear and unequivocal stipulations of a contract, but will be controlled by them. Taylor v. Briggs, 2 C. & P. 525; Smith v. Wilson, 3 B. & A. 728; Blackett v. Royal Exchange Ins. Co., 2 C. & J. 244; Yates v. Pym, 6 Taun. 446; Glendale Man. Co. v. Protection Ins. Co., 21 Conn. 19, 54 Am. Dec. 309; 1 Greenl. Ev. § 292. The usage proved in this case not only extended to a credit sale, but to the manner of sale, which the defendant followed, in taking the note for the price of the plaintiff's cattle and his own, in his own name.

But, if no custom regarding this had existed, we could not say, as it was asked of the judge at the trial, to say, that the circumstances of taking the note, payable to himself, would subject the de-

fendant to this loss. The plaintiff was not injured by this,—the purchasers failed, before the time of credit expired, and it was therefore, immaterial, whether a note had been taken or not, or who retained the possession of it. Nothing is more common, than for factors to buy, sell and sue in their own names. If the isolated fact, that one takes a note in his own name, furnishes, prima facie evidence, that a sale was made on his own account; yet, when explained, as it may be, and shows a mere agency,—only a mode of doing the business for the principal, the responsibilities are not thereby varied. Corlies v. Cumming, 6 Cow. 181. And yet, if a sale be made, and a credit given, without authority, and a note taken for the price, payable to the agent personally, he has been holden liable for the amount. Hemenway v. Hemenway, 5 Pick. 389. And so, if, after the time of credit has expired, the agent shall then give further time, by a note payable to himself. 2 Kent, Com. 622; Hosmer v. Beebe, 2 Mart. (N. S.) 368.

In this opinion, the other judges concurred, except WAITE, J., who tried the cause in the court below, and was disqualified.

New trial not to be granted.

(D) To Collect

CAPEL v. THORNTON.

(Court of King's Bench, 1828. 3 Car. & P. 352, 14 E. C. L. 605.)

Goods sold. Plea—General issue. On the part of the plaintiffs, who were coal merchants, it appeared, that coals were delivered by their servant at the house of the defendant in Regent's Park, with a vendor's ticket in the name of the plaintiffs. No evidence was given of any order, but the vendor's ticket was proved to have been delivered to the defendant's footman; however, there was no proof that it ever reached the defendant.

On the part of the defendant it was proved, that the defendant's son had, for several years, bought coals of a person named Ellsworth, who professed to sell on his own account, but who, unknown to the defendant and her son, really sold on commission. It further appeared, that the defendant's son always received bills of parcels in the name of Ellsworth, and paid him for coals, Ellsworth giving receipts in his own name; and that being asked by her son to deal with Ellsworth, the defendant ordered these coals of him, and received a bill of parcels in his name; and in about a week after the coals were delivered, she paid him for them; however, more than a month after this payment, the plaintiffs sent the defendant a notice "to pay the amount to them or their clerk, and not to Mr. Ellsworth."

Lord TENTERDEN, C. J. The plaintiffs must be called. There is no

evidence that the defendant ever gave any order to the plaintiffs; indeed it is proved, that the defendant only dealt with Ellsworth, who is admitted by the notice to be the agent of the plaintiffs; and if he, as their agent, had authority to sell goods, so had he (in the absence of advice to the contrary) an implied authority to receive the proceeds of such sale. The plaintiffs cannot avow the acts of their agent as to one part of the transaction, and repudiate them as to another part. With respect to the notice, as the money was paid before the notice came to the defendant's hand, that cannot operate in the plaintiff's favour.

Nonsuit.

HIGGINS v. MOORE.

(Court of Appeals of New York, 1866. 34 N. Y. 417.)

Action to recover $2,569.77, the price of a cargo of rye, sold to defendant by a broker to whom defendant paid the price. Verdict for defendant.

PECKHAM, J.[77] The judgment was sustained in the Superior Court mainly on the ground that a grain broker, who had never had possession of the rye sold, but was only authorized to contract for its sale, had thereby an implied authority to receive the purchase-price. The court was not satisfied with the finding of fact by the referee as to the usage of trade, which allowed a payment to a broker, but did not set it aside. I agree that the evidence is entirely unsatisfactory to establish any such usage. To my mind it is utterly insufficient. This court however has no authority to interfere with this judgment upon that ground. The fact as found is conclusive here.

The first question arising here is, had the broker, merely as such, authority to receive payment? I think he had not. In Baring v. Corrie, 2 B. & Ald. 138, Holroyd, J., said: "A factor who has the possession of goods differs materially from a broker. The former is one to whom goods are sent or consigned. He not only has the possession, but generally a special property in them; but the broker has not the possession, and so the vendee cannot be deceived by that, besides employing a broker to sell goods does not authorize him to sell in his own name."

In that case it was held that the purchaser from a broker had no authority to set off a debt against the broker, on the ground that the broker had no authority to sell in his own name. Brokers are defined to be "those who make contracts between merchants and tradesmen in matters of money and merchandise for which they have a fee." 1 Liv. Agency, 73 (Ed. 1818).

It has been questioned among civilians, says Livermore, whether

[77] Part of the opinion is omitted.

an authority to sell or let includes an authority to receive the price or not, and that Pothier says this power is not generally included. Id. 74; Pothier's Traite des Obligations, 477. But that in some cases it will be presumed, as if goods are put into the hands of public brokers to be sold, and they are in the habit of receiving the price. Putting the goods in their hands implies an authority to receive payment, 2 Liv. 284, 285, as it does to receive payment on securities. 3 Chit. Com. Law, 207, 208.

The general doctrine is, that a broker employed to sell has no authority as such to receive payment. Russ. Fact. & Brokers, 48 Law Lib. 68–110; Mynn v. Joliffe, 1 Wood & Rob. 326; Baring v. Corrie, 2 B. & Ald. 137. Exception is made to this general rule in some cases where the principal is not disclosed. Smith Mer. L. 129, by Hol. & Gholson; see, also, as throwing light upon this question, though not directly in point, Whitbeck v. Waltham, 1 Sol. 157; Morris v. Cleasby, 1 M. & S. 576. Story says an agent to conclude a contract is not, of course, authorized to receive payment thereunder. Story, Agency, § 98, and cases there cited.

Where the person contracting for the sale has the property in his possession, and delivers it, he is clothed with the indicia of authority to receive payment, especially when the owner is not known. Such are the cases referred to by the court below. He is then clothed with apparent authority, and that as to third persons is the real authority. Capel v. Thornton, 3 Car. & P. 352; Pickering v. Busk, 15 East, 38, ante, p. 319. In the latter case the property had been put into the possession of the broker and the title in his name. "The sale was made by a person who had all the indicia of property." Ireland v. Thompson, 4 C. B. 149.

Cross v. Haskins, 13 Vt. 536: In this case, in the facts as stated, it does not distinctly appear; but it was so stated in the syllabus of the case by the reporter. Hackney v. Jones, 3 Humph. 613.

In the case at bar however, the broker never had possession of the rye,[78] and never delivered it; but the plaintiffs retained possession till they delivered to the defendant, and they were well known to the defendant; one of them had taken part in the negotiation for the sale, as owner, in the city of New York. The broker was simply authorized to make a contract for the sale. This was the whole of his authority in reality, and he had no other or further apparent authority.

Irrespective of the usage found by the referee therefore the defendant was not discharged by a payment to the broker. * * * Reversed.[79]

[78] As to receipt of payment by an agent in possession of the goods sold, see Bailey v. Pardridge, 134 Ill. 188, 27 N. E. 89 (1890).

[79] The opinion of Wright, J., is omitted.

HOWARD v. RICE.

(Supreme Court of Georgia, 1875. 54 Ga. 52.)

WARREN, C. J.[80] * * * The question involved in this case is whether an agent, who is authorized to sell certain specific machines for his principals, and who sells one on time, and takes a note from the purchaser thereof, due at a future day, payable to his principals, and delivers the note to them, is then their agent to receive the payment of the note, the same not being in the possession of such agent, but in the hands of his principals.[81] In other words, was the payment of the note given by the defendant payable to the order of Howard & Soule for a sewing machine purchased of their agent, Shaffer, a good payment of that note as against them, when made to Shaffer, their agent, at his office in Athens, he not having the note in possession, but promising the defendant he would get the note from the plaintiffs and deliver it up to him.

The rule as stated by Paley on Agency is well sustained by authority, and that rule is, that if money be due upon a written security, it is the duty of the debtor, if he pay it to an agent, to see that the person to whom he pays it is in possession of the security, for though the money may have been advanced through the medium of the agent, yet if the security do not remain in his possession, a payment to him will not discharge the debtor. Paley on Agency, 274. Although the defendant in this case may have received the plaintiffs' machine through the medium of their agent, he promised to pay them for it, and if he took the risk of paying the agent the money due to the plaintiffs therefor, when he knew the agent did not have his note, it will not discharge him from its payment to the plaintiffs unless he could show that they had received the money. Smith on Mercantile Law, 68, thus states the rule: "Where money is due upon a written security, such as a bill or bond, it is the duty of the debtor, if he pay to an agent, to see that such agent is in possession of the security, for otherwise he will not be discharged unless the money reach the principal; not even though the agent whom he pays may have been usually employed to receive money, for his non-production of the security rebuts the implication of authority arising from such his employment." The same principle is recognized by Story on Agency, § 98. See the case of Williams v. Walker, 2 Sandf. Ch. 325, in which the authorities bearing upon this question are cited and reviewed.

[80] Part of the opinion is omitted.

[81] For interesting illustrations of the variations of situation as affecting the right to pay the agent, see Law v. Stokes, 32 N. J. Law, 249, 90 Am. Dec. 655 (1867); Crawford v. Whittaker, 42 W. Va. 430, 26 S. E. 516 (1896); and Butler v. Dorman, 68 Mo. 298, 30 Am. Rep. 795 (1878), containing a valuable review of the authorities.

The case of Capel v. Thornton, 14 E. C. L. 605, ante, p. 389, cited by the defendant in error, in which it was held that an agent authorized to sell goods has, in the absence of advice to the contrary, an implied authority to receive the proceeds of such sale, was an action for coals delivered. There was no written security given therefor in that case. If Shaffer had authority to sell the plaintiffs' machines, as their agent, he would have had the implied authority to have received the money therefor from the purchaser; or if authorized to sell on credit, to have taken the purchaser's note, payable to them, as was done in this case; but it does not follow that the agent had the authority to collect that note, due eight months after date, when it had been turned over to the plaintiffs as their property by the agents, without proof of any special authority to do so, or any evidence that such had been their habit and custom, the agent not having the note in his possession. We have given to this question quite a thorough examination, on account of the apparent hardship of requiring the defendant to pay for the machine twice, but we are well satisfied as to the law applicable to the facts of the case, and feel bound to enforce the general rule of the law in this case as well as in all other cases. This general rule of law will injure no one who exercises the ordinary degree of prudence in requiring the production of his note before he pays it. In our judgment, the court below erred in overruling the motion for a new trial.

Let the judgment of the court below be reversed.

HAHNENFELD v. WOLFF.[82]

(Common Pleas of New York City and County, General Term, 1895. 15 Misc. Rep. 133, 36 N. Y. Supp. 473.)

Action for the price of merchandise. Defense payment.

BISCHOFF, J. It was conceded by the defendant that the sale was made to him through the instrumentality of one Grimshaw, and it conconclusively appeared from the invoice in defendant's possession, and produced by him, upon which the alleged payments to Grimshaw were receipted for by the latter, that the defendant, before such payments knew the plaintiff, and not Grimshaw, to be his vendor. Grimshaw was employed by the plaintiff to solicit orders from customers, and did not appear to have been intrusted with the possession of the whole or any part of the merchandise sold. Under these circumstances the payments to Grimshaw were made by the defendant at his peril of the former's

[82] Accord: Clark v. Murphy, 164 Mass. 490, 41 N. E. 674 (1895); Simon v. Johnson, 101 Ala. 368, 13 South. 491 (1893), containing a discriminating review of conflicting cases; Kornemann v. Monaghan, 24 Mich. 36 (1871); Brown v. Lally, 79 Minn. 38, 81 N. W. 538 (1900). Cf. Hoskins Co. v. Johnson, 5 Sneed, 469 (1858), giving a much broader scope to the power of the selling agent.

want of authority. It is well settled that an agent to solicit orders merely, or to sell goods, who has not the possession of the goods, has no implied or apparent authority to receive payment. Higgins v. Moore, 34 N. Y. 417; McKindly v. Dunham, 55 Wis. 515, 13 N. W. 485, 42 Am. Rep. 740; Butler v. Dorman, 30 Am. Rep. 795; Meyer v. Stone, 46 Ark. 210, 55 Am. Rep. 577; Kane v. Barstow, 42 Kan. 465, 22 Pac. 588, 16 Am. St. Rep. 490; Kohn v. Washer, 64 Tex. 131, 53 Am. Rep. 745.

Proof of Grimshaw's authority to collect, either by plaintiff's express direction, or by inference from a course of dealing, was, therefore, essential to the defendant's success upon the trial (Higgins v. Moore, supra; Lamb v. Hirschberg, 1 Misc. Rep. 108, 20 N. Y. Supp. 678), and the absence of such proof renders the judgment appealed from erroneous. Judgment reversed, and new trial ordered, with costs to the appellant to abide the event.

(E) To Rescind

BRADFORD v. BUSH.

(Supreme Court of Alabama, 1846. 10 Ala. 386.)

Action on a note for $500 given in payment of horses purchased from the agent of plaintiff. Upon evidence that subsequent to the trade the agent said to defendant that if one of the horses was older than he represented he would take her back and allow for her value on the note, the jury allowed plaintiff only $229.89. Plaintiff appeals.

COLLIER, C. J.[83] It does not follow that if a person is authorized to sell property, his agency continues, so as to permit him to rescind the sale, or adjust the damages which the vendee may sustain by a breach of warranty. The transaction is complete by the sale, and the rights of the parties become vested, the one in the thing sold, and the other in the price. And it is incumbent upon the vendee, if he relies upon the acts or declarations of a third person as furnishing a defence to the payment of the purchase money, to prove that that person occupied such a relation in respect to the vendor, as made his acts and declarations evidence against him. * * *

Reversed and remanded.

[83] Part of the opinion is omitted.

DENMAN v. BLOOMER.

(Supreme Court of Illinois, 1849. 11 Ill. 177.)

Assumpsit to recover money paid by Denman to Bloomer's agent, Johnson. Johnson had sold Denman a raft of lumber on the Mississippi river and landed it. Denman thought it not safely landed, but Johnson said he would insure it. Denman paid Johnson $300 on the price. Next morning the raft was gone down the river and Johnson rescinded the sale and gave Denman a draft for $34 on Bloomer, which Bloomer now refuses to pay.

CATON, J.[84] The fifth and eighth instructions given for the defendant, were erroneous. The eighth instruction supposes that Bloomer was the owner of the raft, and that Johnson was his agent to sell it, and receive the purchase money. The jury were then instructed, that if Johnson had sold and delivered the raft to Denman, and received a part of the purchase money, he had no authority to rescind the sale, and make Bloomer liable for the money thus received.

An agent appointed for a special purpose—to transact a particular business, cannot go beyond the scope of such an appointment, and bind his principal; nor can he act after such employment ceases, by his having completed and closed up the business, to transact which he was constituted an agent; but within the scope of such employment, and until the power conferred is thus exhausted, or has been revoked, the agent can bind the principal, to the same extent that the latter could have bound himself. In this case, Johnson's powers had not terminated by his having completed the business confided to him. He had sold the raft, it is true, but he had received only a part of the purchase money, while his employment required him to collect the whole. To deny the authority of the agent to take back the raft, while the transaction was thus incomplete, would often prove most detrimental to the principal. Suppose the agent had discovered that Denman was insolvent, and that, in all probability, the balance of the purchase money would be lost, authority to rescind the sale, and take back the raft, would have been indispensable to entitle him to protect the interest of the principal.

This is not so strong a case as that of Anderson v. Coonley, 21 Wend. 279. There the agent was authorized to contract for barley, and it was held, that he might rescind a contract which he had made, so long as his authority to make other purchases still continued. The case of Bradford v. Bush, 10 Ala. 386, does not conflict with the principles above laid down, or with the case referred to. There the agent was authorized to sell some horses, which he disposed of to the defendant, and received other property, and a note, in payment. It was held that the agent could not, at a subsequent time, bind his principal,

[84] Part of the opinion is omitted.

by a new agreement, to make good a defect in some of the horses. Clearly, in this case, the powers of the agent were exhausted, and his authority terminated. The case before us, however, was very different. The agent had but partially completed the transaction, when he thought proper to rescind what had been done; and in doing this, we think he acted within the scope of the authority, which the instruction supposes was conferred upon him, and perhaps for the best interests of his principal.[85] * * *

Reversed with costs.

III. To Sell Real Estate

(A) In General

MARR v. GIVEN.

(Supreme Judicial Court of Maine, 1843. 23 Me. 55, 39 Am. Dec. 600.)

Writ of entry. Given bought a farm, giving a mortgage back. Suit and entry had been made to foreclose. To save the place, Given gave to Moody a power of attorney under which he made a quitclaim deed from Given to Rufus Marr. The latter paid the mortgage, saying that Given could have the place back by paying back the money, but he had not done so. Henry Marr, claiming under quitclaim to Rufus Marr, brings this action against Hannah, the wife of John Given.

Shepley, J. The intentions of the parties are to be regarded in the construction of the power of attorney from John Given to Elias Moody. It is not necessary, that a power to convey lands should be expressly delegated. It may be imparted by implication. Com. Dig. Poiar, A. 2. Moody was authorized "to bargain, sell, grant, release, and convey"; "and upon such sale or sales, convenient and proper deeds, with such covenant or covenants, general or special, of warranty, quitclaim, or otherwise, as to my said attorney, shall seem expedient, in due form of law, as my deed or deeds, to make, seal, deliver, and acknowledge." The power of attorney is silent as to what he was to sell and convey. The language used was appropriate to the sale and conveyance of real estate according to the forms in use in this part of the country, and not usual in the sale and conveyance of personal property.

The power is sufficiently broad to authorize the agent to sell and convey whatever estate Given might then own. And it would seem to be necessary to permit it to have that effect, or to decide, that it was wholly void. Moody, by virtue of it, claimed the power to convey the

[85] The power of an agent authorized to sell machinery to take back the machine if it does not work is discussed in Oster v. Mickley, 35 Minn. 245, 28 N. W. 710 (1886). See, also, Butler v. Dorman, 68 Mo. 298, 30 Am. Rep. 795 (1878).

right in equity to redeem the estate, which Given had before conveyed in mortgage to Brinley, and made a conveyance of it to Marr, who caused it to be recorded, and entered into possession of the greater portion of the estate, and has continued to possess it without interruption for nearly twenty years. Given, during all that time, has never denied, that Moody was fully authorized to sell, has never claimed any interest in the land, and does not now claim any. The defendant was instrumental in procuring the conveyance to be made to Marr under that power, and in inducing him to advance the money due upon the mortgage, and does not therefore place herself in a position to claim such a limited construction of the power, as will wholly defeat it, and deprive Marr of the land. She must be regarded as a stranger to the title. The language used in the power and explained by the conduct of the parties for so long a period authorizes the conclusion, that it was their intention to authorize a sale and conveyance of all the rights of Given in any real estate.[86]

Judgment for demandant.

McCULLOUGH v. HITCHCOCK.

(Supreme Court of Errors of Connecticut, 1899. 71 Conn. 401, 42 Atl. 81.)

Action for specific performance of a contract for the sale of land purporting to be made by defendant by Anderson & Mead, his agents. Defendant had written them saying he would like to sell if he could do so to advantage, but as he had no knowledge of the value he would like to have them give him an idea of the value and find a purchaser.

ANDREWS, C. J. Anderson & Mead had no authority to make a written contract binding on the defendant to convey the land in question, unless it can be found in the letter of November 23, 1896. That letter does not, in terms, purport to give any such authority. The contention of the plaintiff is that such authority is implied from the request in the letter to find a purchaser; that it is a custom of the real estate business that a broker authorized to find a purchaser for lands may sign a binding contract for the sale of that land. We do not understand any such custom to exist in this state. A custom can exist only as a matter of fact. Smith v. Phipps, 65 Conn. 307, 32 Atl. 367. There is no finding that any such custom prevails in Connecticut, and there is no case cited which recognizes any such rule.

A real estate broker or agent is one who negotiates the sales of real property. His business, generally speaking, is only to find a pur-

[86] Compare Bosseau v. O'Brien, 4 Biss. 395, Fed. Cas. No. 1,667 (1869), in which the court holds that authority to an agent to sell real estate must be clear and distinct, of such character that a fair and candid person must see without hesitation that the authority is given. An answer to an agent, "I will sell" on terms specified, gives the agent no authority to make a contract of sale, even on those terms. By common law the power to convey must be under seal. Heath v. Nutter, 50 Me. 378 (1862), ante, p. 134.

chaser who is willing to buy the land upon the terms fixed by the owner. He has no authority to bind the principal by signing a contract of sale.[87] A sale of real estate involves the adjustment of many matters besides the fixing of the price. The delivery of the possession has to be settled; generally the title has to be examined; and the conveyance, with its covenants, is to be agreed upon and executed by the owner. All of these things require conferences, and time for completion. These are for the determination of the owner, and do not pertain to the duties, and are not within the authority, of a real estate agent. For these obvious reasons, and others which might be suggested, it is a wise provision of the law which withholds from such an agent, as we think it does, any implied authority to sign a contract of sale in behalf of his principal. Coleman v. Garrigues, 18 Barb. 60; Roach v. Coe, 1 E. D. Smith, 175; Lindley v. Keim, 54 N. J. Eq. 418–423, 34 Atl. 1073; Duffy v. Hobson, 40 Cal. 240, 6 Am. Rep. 617; 4 Am. & Eng. Enc. Law (2d Ed.) 964, note; 3 Waite, Act. & Def. 286, 287; Halsey v. Monteiro, 92 Va. 581, 24 S. E. 258; Armstrong v. Lowe, 76 Cal. 616, 18 Pac. 758.

There is no error. The other judges concurred.

CARSTENS v. McREAVY.

(Supreme Court of Washington, 1890. 1 Wash. 359, 25 Pac. 471.)

Action to compel specific performance of an alleged agreement to convey two lots in the city of Seattle.

STILES, J.[88] * * * The appellant was the owner of certain real property in the city of Seattle, and the court found that, at a certain date, agents named, who were real-estate agents in Seattle, "were the agents of defendant for the sale of the aforesaid real estate, and were then and there duly authorized and empowered by the defendant, by writing under the defendant's hand, to make and negotiate a sale of said real estate." The agents, thus authorized, executed and delivered to the appellee a contract for the sale of the appellant's property, without his knowledge, and in his absence from the state, and received a portion of the purchase money. Appellant refused to recognize the contract thus made, claiming that the authority by him given to "sell" did not include the authority to execute a contract, or anything more than to find a purchaser. This was the vital point in the case, upon which the court held with the appellee, and directed that the contract thus made be performed.

The statute of frauds may be satisfied by the execution of a con-

[87] For an interesting discussion of the powers of factors and brokers, and of the consequent restrictions of the powers of real estate brokers, see Davis v. Gordon, 87 Va. 559, 13 S. E. 35 (1891).

[88] Part of the opinion is omitted.

tract for the sale of lands by the hand of another person than the party to be charged, if that person be thereunto lawfully authorized, and it is well settled that such third person may be thus lawfully authorized orally, by written direction not under seal, and even by a course of conduct amounting to an estoppel. It, therefore, only remains to determine whether the ordinary real-estate agent or broker, authorized to sell land, is thereby empowered to enter into a contract binding upon his principal, in an action for specific performance.[89] A real-estate agent is a person who is, generally speaking, engaged in the business of procuring purchases or sales of lands for third persons, upon a commission contingent upon success. He owes no affirmative duty to his client, is not liable to him for negligence or failure, and may recede from his employment at will, without notice. On the other hand, courts almost unanimously unite in holding that in case of an ordinary employment to sell, when he has procured a party able and willing to buy upon the terms demanded by his principal, and has notified him of the purchaser's readiness to buy, the agent's work is ended, and he is entitled to his commission. It is not his duty to procure a contract, or to make one, and he is not in default if he fails to do either. Therefore, to our minds, it seems clear that, ordinarily, it is not within the contemplation of the owner and agent, where property of this character is placed in the hands of the latter for sale, that he shall, without consultation with his client, execute a contract.

We are aware that courts have held to this extent, basing their decisions upon a distinction between an authority to sell and an authority to find a purchaser, and upon the well-known rule that an authority to an agent to do a thing is presumed to include all the necessary and usual means of executing it with effect. But such holdings do not commend themselves to our judgment, and as this is a new question in this state, and we are satisfied that it is not the general practice of agents to make such contracts, we do not hesitate to dissent from the decisions above mentioned, especially as there is no lack of authority for the position we take. We cannot shut our eyes to the obvious defect in the argument that authority to sell, in this instance, necessarily implies authority to execute a contract. A sale of land "executed with effect" includes the execution of a deed, and the delivery of possession, neither of which the agent can do, unless his authority to sell is supplemented by the delivery of possession to him, and a power of attorney to convey; so that he does not, although in possession of the authority to "sell," have all the necessary means of executing that authority with final effect. He stops short somewhere, and, when we are inquiring where the probable and

[89] See Duffy v. Hobson, 40 Cal. 240, 6 Am. Rep. 617 (1870); Armstrong v. Lowe, 76 Cal. 616, 18 Pac. 758 (1888); Scully v. Book, 3 Wash. 182, 28 Pac. 556 (1891); Milne v. Kleb, 44 N. J. Eq. 378, 14 Atl. 646 (1888), containing a review of the cases.

proper place of his stoppage is, the evils that would attend the extension of his actual authority, beyond the finding of a purchaser, furnish ample reasons for fixing his limit there.

An agency of this kind may be created by the slightest form of words, without any writing, leaving it to litigation to determine whether the substance of the authority is "to sell," or "to find a purchaser," wherein the unscrupulous and dishonest agent would be at once arrayed as the principal witness against his client, with every advantage from some note, "made at the time," of what the instruction was. Perjury would go at a premium in such cases, and the confiding and unlettered would be its victims. Scarcely any man, when listing his property with a real-estate agent, stops to give details, either as to the property itself or as to the arrangements he desires to make, yet no one would sell upon equal terms to a first-class business man, and to an habitual drunkard, or well-known insolvent; and the ordinary owner would not sell at all to a person whose very occupancy would tinge the neighborhood with a bad repute. These are good reasons, and are probably some of the reasons why custom and the law have made it not necessary that real-estate agents should actually procure contracts in order to earn their compensation, and why, in this connection, the common understanding of the phrase "authority to sell" means only authority to find a purchaser, whether the authority be given orally, or by written request.

In considering this case, we have examined the numerous authorities cited by both sides, as well as many others, and find the position we take fully sustained by Morris v. Ruddy, 20 N. J. Eq. 236; Milne v. Kleb, 44 N. J. Eq. 378, 14 Atl. 646; Duffy v. Hobson, 40 Cal. 240, 6 Am. Rep. 617; Armstrong v. Lowe, 76 Cal. 616, 18 Pac. 758; Mechem, Ag. § 966; Warvelle, Vend. 213; 2 Amer. & Eng. Enc. Law, p. 573, note 2. The earlier cases in New York were to the same effect, notably Coleman v. Garrigues, 18 Barb. 60, and Glentworth v. Luther, 21 Barb. 145; but they were overthrown by Haydock v. Stow, 40 N. Y. 363, without sufficient reason, as it seems to us. We note that in nearly, if not all, the states where the courts at any time held agents to sell real estate authorized to execute contracts of sale, especially in New York and Illinois, the legislatures very soon after amended the statutes of frauds, so as to require the agent's authority to contract to be in writing.

Lyon v. Pollock, 99 U. S. 668, 25 L. Ed. 265, presents a state of facts not found, to any extent whatever, in the case at bar, and is therefore not applicable, and the same may be remarked of Rutenberg v. Main, 47 Cal. 213. What a broker must do to "complete a sale" is well defined in McGavock v. Woodlief, 20 How. 227, 15 L. Ed. 884, thus: "The broker must complete the sale; that is, he must find a purchaser in a situation, and ready and willing, to complete the purchase on the terms agreed on, before he is entitled to his com-

mission." Per contra, if the broker has "completed the sale" so as to be entitled to his commissions, by finding a purchaser, without a contract, his duty is thereby performed, and his authority exhausted.

The judgment of the court below must be reversed, and the action dismissed; costs to appellants.

LYON v. POLLOCK.

(Supreme Court of the United States, 1878. 99 U. S. 668, 25 L. Ed. 265.)

Action in equity to compel conveyance by Lyon of land sold to Pollock by Lyon's agent. Lyon, who was a Union man during the Civil War, had left Texas.

Mr. Justice FIELD, after stating the case, delivered the opinion of the court.

This case turns upon the construction given to the letter of Lyon to Paschal, of the 24th of August, 1865. That letter clearly did not authorize the execution of a conveyance by Paschal in the name of Lyon to the purchaser. Its insufficiency in that respect was authoritatively determined in the action at law for the lands; the instrument executed by Paschal as the deed of Lyon being held inoperative to pass the legal title. The question now is, was the letter sufficient to authorize a contract for the sale of the lots? To determine this, and give full effect to the language of the writer, we must place ourselves in his position, so as to read it, as it were, with his eyes and mind. It appears from his answer, as well as his testimony, that he was in great danger of personal violence in San Antonio, shortly after the commencement of the rebellion, owing to his avowed hostility to secession, or at least that he thought he was in such danger. He apprehended that his life was menaced, and was in consequence induced to flee the country. He possessed at the time a large amount of property, real and personal, in San Antonio. This he confided to the care of his partner, Bennett, to whom he gave a power of attorney, authorizing him to take charge of and control the same, and sell it for whatever consideration and upon such terms as he might judge best, and execute all proper instruments of transfer; and also to collect and receipt for debts due to him. Bennett took possession of Lyon's property and managed it until July, 1865, when he transferred it, with the business and papers in his hands, to Paschal, and at once informed Lyon by letter of the transfer. It was under these circumstances that the letter of Lyon to Paschal, which is the subject of consideration, was written. Its language is: "I wish you to manage [my property] as you would with your own. If a good opportunity offers to sell every thing I have, I would be glad to sell. It may be parties will come into San Antonio who will be glad to purchase my gas stock and real estate."

Situated as Lyon then was, a fugitive from the state, it could hardly have been intended by him that if propositions to purchase his property or any part of it were made to Paschal, they were to be communicated to him, and to await his approval before being accepted. He was at the time at Monterey, in Mexico, and communication by water between that place and San Antonio was infrequent and uncertain; and he states himself that it was impossible to send letters by Matamoras, as the road was blockaded. Writing under these circumstances, we think it clear that he intended by his language, what the words naturally convey, that if an opportunity to sell his property presented itself to Paschal, he should avail himself of it and close a contract for its sale.

His subsequent conduct shows, or at least tends to show, that such was his own construction of the letter, and that he approved, or at least acquiesced in, the disposition made of his property. He must have been aware, from the laws of the state, which he is presumed to have known, that taxes were leviable upon his property, and that unless they were paid the property would be sold for their payment; yet he confessedly took no steps from 1865 to 1873 to meet them, and thus prevent a forced sale of his property; a course perfectly natural if it be conceded that the property was in charge of an agent, with power to manage and sell it as his judgment might dictate. His indifference, also, after rumors reached him that a sale of his property had been made by Paschal in 1867, can scarcely be explained upon any other hypothesis. The same may be said of his inattention to the payment of the assessments upon his stock in the San Antonio Gas Company, of which he had received intimations. From the time Paschal took charge of his property, in 1865 to 1873, a period of eight years, he certainly manifested, if his own story be accepted, a most extraordinary want of interest in regard to his real property, of great value, situated in an unfriendly community, subject to taxation, and liable to be sold if the taxes were not promptly paid; and also in regard to his personal property, consisting of shares in the San Antonio Gas Company, of great value, liable to assessments, and to sale if the assessments were not paid when due. It is much more reasonable to suppose that he knew of the sales made of the real property and of the assessments on the shares, and that he was undisturbed by the reports which reached him, because be considered that the sales were made and the assessments paid from the proceeds, by his authorized attorney.

The testimony of Bennett tends also to corroborate this view. He states that he knew from his correspondence with Lyon that he treated Paschal as his agent for the sale of his property. The conduct of Lyon, as expressive almost as any language which he could use, cannot, of course, change the construction to be given to the words contained in his letter to Paschal, but it tends to strengthen the conclusion as to the intention of the writer.

Holding the letter to confer sufficient authority to contract for the sale of Lyon's real property in San Antonio, there can be no doubt of the right of the complainants to the relief prayed. The deed executed to them by Paschal in the name of Lyon, though invalid as a conveyance, is good as a contract for the sale of the property described in it; and is sufficient, therefore, to sustain the prayer of the bill for a decree directing Lyon to make a conveyance to them and enjoining the enforcement of the judgment at law.[90]

Decree affirmed.

PENFOLD v. WARNER.

(Supreme Court of Michigan, 1893. 96 Mich. 179, 55 N. W. 680, 35 Am. St. Rep. 591.)

HOOKER, C. J. John W. Zimmerman, being the owner of a parcel of land in Frankfort, Benzie county, Mich., joined with his wife, Barbara E. Zimmerman, in a power of attorney to their son, Morris M. Zimmerman. This was duly acknowledged and recorded. In 1888, John W. Zimmerman quitclaimed the premises to his wife, Barbara, and, shortly after, died. In 1890, Morris W. Zimmerman, as attorney for Barbara Zimmerman, conveyed the premises, except the west 100 feet, to the plaintiff, for a valuable consideration, by warranty deed. In September, 1891, Barbara E. Zimmerman quitclaimed the premises, except the west 50 feet, to the defendant. Plaintiff brought ejectment. Judgment being rendered in favor of the defendant, the plaintiff appealed.

This power of attorney was given by husband and wife at the time when the title to the real estate in question was vested in him, and his wife had no title to any lands, aside from her inchoate right of dower in this parcel. Counsel argue from these facts that the language of the power should be construed to cover lands subsequently acquired, while on the other hand it is contended that this power of attorney conferred no greater authority than to convey her right of dower in a deed whereby her husband's title should be conveyed.

We are impressed by the importance of certainty in instruments authorizing the conveyance of lands, and by the serious consequences likely to arise if it be determined that a power of attorney may mean one thing or another, as the tints of surrounding circumstances resting on parol testimony may vary. When placed upon record, as under our recording laws it may be, there should be no uncertainty in its mean-

[90] Authority to sell on special terms authorized an agent to make an executory contract to convey, but not on different terms. Jackson v. Badger, 35 Minn. 52, 26 N. W. 908 (1886). The power must be interpreted with reference to the subject-matter and the circumstances under which the agent acts. Carson v. Smith, 5 Minn. 78 (Gil. 58) 77 Am. Dec. 539 (1861); Bissell v. Terry, 69 Ill. 184 (1873). Authority to do with land as "if it was your own" gives no authority to sell or lease. Ward v. Thrustin, 40 Ohio St. 347 (1883).

ing, and strangers should not be required to look beyond the language used. We are aware that there are authorities which appear to attach importance to surrounding circumstances, but, beyond such as may be deemed to create an estoppel, we cannot approve them; and, inasmuch as titles to land cannot in Michigan be maintained upon an estoppel, we cannot recognize the authority of such cases. Eliminating extrinsic circumstances from the question, its solution is comparatively easy. No doctrine is better settled than that these "powers of attorney are strictly construed, and cannot be enlarged by construction." Wood v. Goodridge, 6 Cush. 117, 52 Am. Dec. 771; Morrell v. Frith, 3 Mees. & W. 402; Neilson v. Harford, 8 Mees. & W. 806; Withington v. Herring, 5 Bing. 442; Rossiter v. Rossiter, 8 Wend. 494, 24 Am. Dec. 62; Jeffrey v. Hursh, 49 Mich. 31, 12 N. W. 898; Id., 58 Mich. 246, 25 N. W. 176, and 27 N. W. 7.

The legislature has signified its approbation of this doctrine by restricting powers by statute. See How. St. c. 215; Id. §§ 5625, 5629. Recurring to the instrument in question, we find the language to be as follows: "John W. Zimmerman and Barbara, his wife, * * * do make, constitute, and appoint Morris W. Zimmerman our true and lawful attorney for us, and in our name, place, and stead, and in the name, place, and stead of either of us, to bargain, sell or mortgage any and all real estate belonging to us, or either of us, in any real estate in the county of Benzie," etc.

The plain import of this language limits the power to lands then owned by the parties. Weare v. Williams, 85 Iowa, 253, 52 N. W. 328. As the title then stood, plaintiff had no title in the premises. She had an inchoate right of dower, which she might release by joining with her husband in a deed of the premises, or by her conveyance to the holder of the title. Rhoades v. Davis, 51 Mich. 306, 16 N. W. 659. It was not an interest that could be conveyed by her so long as the husband held the title to the fee. But when she received a deed from her husband, and became owner of the fee, the inchoate right of dower was extinguished by the merger, and there was nothing left for it to operate upon, so far as that parcel of land was concerned, unless we are to extend the power by construction, which, as we have seen, the courts do not favor. This land did not belong to her when the power of attorney was executed.[91]

Some other questions are raised upon the record, but, as the case must hinge upon the power of attorney, we think it unnecessary to pass upon them. The judgment will be affirmed. The other justices concurred.

[91] For distinction between authority to sell "all the land I own" and "any lands I may own," see Weare v. Williams, 85 Iowa, 253, 52 N. W. 328 (1892), and the cases there reviewed.

(B) *To Convey and Warrant*

VALENTINE v. PIPER.

(Supreme Judicial Court of Massachusetts, 1839. 22 Pick. 85, 33 Am. Dec. 715.)

Writ of entry, wherein was demanded the premises appurtenant to an ancient wharf. Demandants relied on a deed, executed by Geo. Sullivan as attorney of Andrew Price, a clergyman in England, to Lawson Valentine, father of the demandants.

SHAW, C. J.[92] The present case comes before the Court upon a motion of the defendant to set aside the verdict and grant a new trial, on the grounds of misdirection, and mistake of law in the admission of evidence, and as a verdict against evidence.

The action was brought by the heirs of Lawson Valentine, to recover a tract of flats, over which the sea ebbs and flows, as appurtenant to, and parcel of a tract of land, bounded on salt water, and the plaintiffs began by showing a title to the upland, in respect to which this tract of flats was claimed. The land consisted of a wharf, lying near the bottom of Summer street, bounding on Boston harbour, known at different periods, as Valentine's wharf, Price's wharf and Bull's wharf. Valentine claimed under several persons of the name of Price.

The first exception is to an instrument, purporting to be a letter of attorney from Andrew Price to George Sullivan. Evidence was given, tending to show, that Andrew Price, at the time of making the instrument, and for many years previous, had resided in England, and the instrument purported to have been executed there. Under these circumstances, secondary evidence was offered to prove the execution of the instrument, which was objected to, without calling the attesting witnesses, or proving that they were not within the jurisdiction of the court, but the objection was overruled, and the secondary evidence admitted. And the Court are of opinion, that this was correct. * * *

Some objection was taken to the legal effect of this instrument. It purported to authorize the attorney to make sale of the real estate of the constituent, as therein described, but there were no express words authorizing the attorney to execute a deed or deeds. But the Court are of opinion, that the instrument is not open to this exception. Where the term "sale" is used in its ordinary sense, and the general tenor and effect of the instrument is, to confer on the attorney a power to dispose of real estate, the authority to execute the proper instruments required by law, to carry such sale into effect, is necessarily incident. It is in pursuance of a general maxim, that an authority to accomplish a definite end, carries with it an authority, so

[92] Part of the opinion is omitted.

far as the constituent can confer it, to execute the usual, legal and appropriate measures proper to accomplish the object proposed. A power of attorney might be so drawn as to authorize the attorney to make sale of an estate, where it might be apparent that it was the intention of the constituent to authorize the attorney to negotiate for a sale, leaving it to the constituent afterwards to ratify it and to execute deeds. Should it appear, either from the restricted words used, or from the tenor of the whole instrument, that such was the intent, it ought to be construed as conferring such a restricted power only.

In the present case, we think it was the intent of the constituent to confer on the attorney an authority to transfer the estate.[98] * * * Judgment upon the verdict for demandants.

SCHULTZ v. GRIFFIN.

(Court of Appeals of New York, 1890. 121 N. Y. 294, 24 N. E. 480, 18 Am. St. Rep. 825.)

Griffin gave Schultz a contract to pay him $1,000 upon his sale of Griffin's farm for $20,000, part cash and part by payment of two mortgages on the farm. Schultz sued for his commission and recovered. Griffin appeals.

ANDREWS, J. The principal point urged for the reversal of the judgment is that the contract tendered to the defendant, whereby Longnecker agreed to pay such portion of the purchase money as was represented by the mortgage to the Buffalo Savings Bank and the mortgage to Williams "by assuming" those mortgages, was not a compliance with the terms upon which Schultz was employed to sell the farm. It is insisted that his authority extended only to a sale in which the purchaser should absolutely pay and discharge the mortgages, and that the agreement made by Longnecker would be satisfied by his paying the portion of the purchase money over and above the mortgages to Griffin personally, and by his assent to a covenant in the deed of the farm to assume the mortgages. The agreement between Schultz and the defendant is not free from ambiguity. The price for which the farm was to be sold is fixed, and the agreement proceeds to specify that the purchase money should be paid, a part to Griffin personally, and a part on the mortgages. The language as to the payment of the mortgages may be susceptible of two meanings, according to extrinsic circumstances.

[98] Accord: Farnham v. Thompson, 34 Minn. 330, 26 N. W. 9, 57 Am. Rep. 59 (1885). While power to sell lands must be strictly construed, it should not be so construed as to defeat the intention of the parties. Hemstreet v. Burdick, 90 Ill. 444 (1878). The distinction between a power to contract to convey and a power to convey is brought out in Hunter v. Sacramento Valley Beet Sugar Co. (C. C.) 11 Fed. 15, 7 Sawy. 498 (1882).

It appears that the mortgages were accompanied by bonds of Griffin. He had an interest that the mortgages should be paid, to relieve him from his liability on the bonds. On the other hand, the contemplated purchaser would have an interest to apply so much of the purchase money as was required for that purpose to the extinguishment of the mortgages. In the absence of any circumstances indicating a different interpretation, and regarding alone the language of the contract, the most natural meaning would seem to be that actual payment of the purchase money, part to Griffin personally, and part on the mortgages, was to be made before any conveyance by Griffin. It seems quite clear that, if the Longnecker contract had been accepted and signed by Griffin, the latter would have been bound to convey on receiving $11,000 in cash, and the covenant of Longnecker assuming the mortgages. Such a transaction would have left Griffin still liable on his bonds, with his liability changed in equity to that of surety for Longnecker for the mortgage debts. Ayers v. Dixon, 78 N. Y. 318.

It does not appear whether the mortgages were or were not due. If it had appeared that they had not matured, so that they could not have been paid without the consent of the holders, we are inclined to think that the contract with Schultz would be construed as an authority to sell the land subject to the mortgages. It could not reasonably be supposed, in such case, that Griffin, who, as the contract shows, was seeking to sell his farm, would have inserted an impossible condition, or one which could not be performed except by the consent of the holders of the mortgages. But the case gives no light upon this point; and, as the burden was upon the plaintiff to show that the contract with Longnecker was such a one as was authorized by the agreement with Griffin, we are of opinion that judgment was erroneously given for the plaintiff.

The further point is made that Schultz was not authorized to make it a condition of the sale that the conveyance should be with warranty. The defendant's counsel cites in support of this point Nixon v. Hyserott, 5 Johns. 58, which supports his contention. The rule that an agent to sell personal property has implied power to warrant, in the absence of any restriction, where sale with warranty is usual and customary in similar cases, was declared in Nelson v. Cowing, 6 Hill, 336, substantially overruling Gibson v. Colt, 7 Johns. 390.

There seems to be no well-founded distinction between real and personal property, requiring a different construction of an agency for sale in the two cases. The great preponderance of authority now is that a power, without restriction, to sell and convey real estate gives authority to the agent to deliver deeds with general warranty binding on the principal, where, under the circumstances, this is the common and usual mode of assurance. Le Roy v. Beard, 8 How. 451, 12 L. Ed. 1151; Peters v. Farnsworth, 15 Vt. 155, 40 Am. Dec. 671; Vanada v.

Hopkins, 1 J. J. Marsh. 293, 19 Am. Dec. 92;[94] Taggart v. Stanbery, 2 McLean, 543, Fed. Cas. No. 13,724; Rawle, Cov. § 20, note.

It is sufficient, however, for the disposition of this appeal, that the first point considered must prevail. Judgment reversed, and a new trial ordered. All concur, except GRAY, J., absent.

(C) To Collect

MANN'S EX'RS v. ROBINSON.

(Supreme Court of Appeals of West Virginia, 1881. 19 W. Va. 49, 42 Am. Rep. 771.)

Action for specific performance of a contract for the sale of land. One Hunter, as agent of Mann, sold the land to Robinson for part cash and part bonds. Hunter received payment of all the bonds. Both principal and agent were now dead. The circuit court held the payment to Robinson good and decreed a deed to Robinson.

GREEN, J.[95] * * * Some of the text-books lay it down broadly, "that an agent employed to sell has no authority as such to receive payment of the purchase-money." See Sugden on Vendors (14th Ed., 8th Am. Ed. 1873) vol. 1, c. 1, § 3, par. 11, p. 70, bottom p. 48. I apprehend, that this broad proposition needs qualification. If the property be personal property, the authority to sell for cash would carry with it generally the power and authority to receive the purchase-money. See Hackney v. Jones, 3 Humph. 612; Taylor v. Nussbaum, 2 Duer, 302; Higgins et al. v. Moore, 34 N. Y. 417; Cross v. Haskins, 13 Vt. 536, 540. But if the subject-matter of the authority to sell be land, it is important to determine accurately, what is meant by authority to sell. There cannot be a perfected sale of land but by conveyance; and a power of attorney under hand and seal authorizing an agent to sell and convey land for cash would confer on the agent the power to receive in cash the purchase-money, when the sale was made.

[94] A leading and well-reasoned case, in which the court held that an agent may do such things as are most usual and proper to accomplish the thing intended to be done, including the giving of a deed with the usual warranties and covenants, and also the breaking up of a great tract of land into smaller tracts such as would be salable. All powers must be construed with a view to the design and object of them. This would not, of course, justify a departure from the instructions, prescribed by the principal in the power. Rice v. Tavernier, 8 Minn. 248 (Gil. 214), 83 Am. Dec. 778 (1863); Smith v. Allen, 86 Mo. 178 (1885). It is sometimes held that to justify the agent in executing a warranty deed, he must have broader power than a naked power to sell. Bronson v. Coffin, 118 Mass. 156 (1875); Id., 108 Mass. 175, 11 Am. Rep. 335 (1871). See, also, the leading case of Le Roy v. Beard, 8 How. 451, 12 L. Ed. 1151 (1850).

As to the effect of a warranty deed, given under authority to execute a quitclaim deed, see Robinson v. Lowe, 50 W. Va. 75, 40 S. E. 454 (1901); Kane v. Sholars, 41 Tex. Civ. App. 154, 90 S. W. 937 (1905).

[95] Part of the opinion is omitted.

See Peck et al. v. Harriott et al., 6 Serg. & R. 146, 9 Am. Dec. 415. On the other hand a verbal or parol authority to sell would mean simply an authority to contract to sell the land; for no verbal or parol authority could be given to make a perfected sale, that is, a conveyance. Such authority must be under seal. Ordinarily an authority to contract to sell would not carry with it an authority to collect the purchase-money. See Mynn v. Jolliffe, 1 Moo. & R. 327.[96]

In Ireland v. Thompson, 56 E. C. L. 167 and 168 (4 Man. G. & S.), Maule, Judge, in speaking of this case, says: "In the case of Mynn v. Jolliffe, 1 M. & R. 326, it was decided that an agent employed to sell an estate is not, as such, authorized to receive the purchase-money. And there is no doubt, that on the sale of an estate to imply such an authority would be most inconvenient and unnecessary; it being clearly for the interest of the vendor, that he, and not his agent, should receive the purchase-money; and no inconvenience to any one arising out of the limit to the authority of the agent, which excludes his right to receive the money. The proper course is clearly, that the vendee should retain the money and the vendor the estate, till the conveyance is made; and thus neither of them runs any risk of loosing the money."

These general views seem to me eminently sound; and as I understand the case of Peck v. Marriott, 6 Serg. & R. 146, 9 Am. Dec. 415, they are the views entertained by that court, though not so expressed in that case.

Sugden to sustain his general proposition refers also to Pole v. Leask, 28 Beav. 562, but I have not access to this case. Doubtless there are some cases, where a parol or verbal authority to sell land would under the circumstances be held to confer authority to receive the cash-payment on the sale of the land being made. Thus if an auctioneer be verbally authorized to sell a lot at public sale upon certain terms, one of which was, that ten per cent. of the purchase-money should be paid in cash on the day of sale, the auctioneer has authority to receive this cash-payment; as the court says: "His authority to receive the stipulated deposit cannot be questioned. He receives the deposit not merely as the agent of the seller. He is bound to keep it for the indemnity of the purchaser, until the latter is enabled to look into the title pro-

[96] Mere power to sell land does not imply power to sell on credit. Presumptively a sale is to be for cash. A usage at the place of sale may rebut this presumption. Winders v. Hill, 141 N. C. 694, 54 S. E. 440 (1906); Marble v. Bang, 54 Minn. 277, 55 N. W. 1131 (1893). But the authority, always understood, to do all things necessary to the execution of the power requires the agent empowered to sell and convey as a mediate act, to receive the price. Without payment before conveyance, the sale might be a fraud upon the principal. Peck v. Harriott, 6 Serg. & R. 146, 9 Am. Dec. 415 (1820). If the agent makes a contract he has no power to make, then he has no right to receive part of the purchase price, neither has he before any contract of sale is entered into. Schaeffer v. Mut. Benefit Ins. Co., 38 Mont. 459, 100 Pac. 225 (1909). Mere authority to contract for a sale, but not to convey, carries no authority to collect payment. White v. Lee, 97 Miss. 493, 52 South. 206 (1910).

posed to be conveyed to him and decide on its sufficiency, or until the lapse of time limited for the purpose in fixing the day for the payment and security for the residue of the price."

So in the case of Yerby v. Grigsby, 9 Leigh, 387, a decree was rendered, which impliedly affirmed, that an agent, who had been appointed by a verbal authority to sell land, had under the circumstances appearing in that case authority to receive the cash-payment. The court says not one word on this subject; and this inference is to be drawn only from the decree. The reporter too fails to state, what the circumstances or evidence was; in stating the law he merely says: "In the opinion of the court below as of this court the evidence established, that John Green was authorized by Charles to make such a contract as was made with the complainant." The contract which was made was a sale of two lots for $425.00, of which $250.00 was to be paid and, as the agreement states, was paid in cash to John Green. So far as I can see, there was no authority from anything appearing in this case to justify the reporter in stating in the syllabus in this case, that so broad a proposition was held in it, as that "when the owner of lands authorized another to make a contract for the sale thereof, the authority of the agent to receive so much of the purchase-money, as is to be paid in hand, is a necessary incident to the power to sell." Nothing of the sort is said by the court; and no such broad proposition can possibly be inferred from the statement of the case or the decree entered.

But be this as it may, there is certainly nothing in this or in any other case, which I have seen, that gives any countenance to the idea, that a simple parol authority to sell land or, what is the same thing, to make a contract of sale would impliedly authorize the agent making the sale to receive the deferred payments of the purchase-money. Such implication would be entirely unnecessary in order for the agent to execute the authority conferred on him; and on every correct principle it could not be made. In such case it is clear, that no authority to the agent to collect any deferred instalments of the purchase-money can be inferred.

In this case not only was no authority given by Mann to Hunter to collect these deferred payments; but the paper, which Mann signed, seems to me to go much further than was necessary and clearly to negative the idea, that Hunter was to collect the deferred payments, if he sold the land. The language used is: "That should H. F. Hunter sell said land, I, William T. Mann, will endorse said sale and take my interest in money or bonds as contracted by said H. Hunter." It is perfectly obvious, that the bonds here referred to are the bonds for the purchase-money of the land when sold. Mann stipulates here expressly, that his share of these bonds was to be given to him, which is utterly inconsistent with the idea, that all these bonds were to be collected by Hunter. But even had there been express authority given by Mann to Hunter to collect the deferred payments of the pur-

chase-money, when the land was sold, yet he would have had no authority to collect it in the manner, in which he did, that is, before it was due, receiving for it according to the deposition of the purchaser, Robinson, cattle, horses, sheep and notes of third parties, which were payable to Robinson. An agent authorized to receive money or collect a debt can not receive another thing, as a house or a bond of a third person in discharge of a debt. See Wilkinson & Co. v. Holloway, 7 Leigh, 284; Gullett v. Lewis, 3 Stew. 27; Wiley v. Mahood, 10 W. Va. 221. These were cases of attorneys at law, who being authorized to collect debts received payment in something else than money; but they show, that the principle is just as applicable to any other agent as to attorneys at law. Indeed they are based on the ground, that the authority of an attorney at law is the same as that of any other agent to collect a debt.

The collection too of a debt before it is due by an agent authorized to collect a debt is generally a violation of his duty; and the person, who knowing his authority pays him money in this way, is responsible, if the money is not paid to the principal. Parnther v. Gaitskell, 13 East, 432. * * *

Decree reversed; cause remanded.

(D) To Fix or Modify the Terms

HAMPTON v. MOORHEAD.

(Supreme Court of Iowa, 1883. 62 Iowa, 91, 17 N. W. 202.)

Action for specific performance of a contract for the sale of land, made by J. W. Moorhead as attorney in fact for the defendant, T. L. Moorhead. The court refused specific performance, but made $2,000, paid the agent, a lien on the land.

ADAMS, J.[97] There is some evidence tending to show that the power of attorney, by virtue of which the sale is alleged to have been made, was forged, but we do not deem it necessary to determine what the fact was. For the purposes of the opinion it may be conceded that the power of attorney was not forged. But, conceding such fact, we are not able to see that, under the plaintiff's own testimony, the sale can be sustained. While it appears clearly enough that the plaintiff paid $2,000 in cash, as the court found, yet it was paid only to J. W. Moorhead, and did not, we think, under the circumstances, as shown by the undisputed evidence, become a payment to Thomas L. Moorhead. There is no pretense that any part of the money actually came into Thomas L. Moorhead's hands. This, to be sure, would not have been necessary to constitute a payment to Thomas L. if J. W. had re-

[97] Part of the opinion is omitted.

ceived the money while acting within the scope of his power. But the undisputed evidence shows that he did not thus act. J. W. Moorhead's power was to make a sale. What he undertook to do was to make an exchange; at least, so far as the transaction in part was concerned. He took a patent-right as a part of the consideration for the land.

The language of the power of attorney is not very accurate, but there is no question as to what it means. After describing the land it sets out the power conferred in these words: "To make sale of the same or any part thereof for such sum or price, and on such terms, as to him (the said attorney) shall seem meet, and to ask, demand, recover, and receive all sums of money which shall become due and owing to me by means of such sale or sales, and to take all lawful means for the recovery thereof," etc. Under this power the attorney was authorized to make a sale, and only that.[98] A sale is defined to be "an agreement by which one of two contracting parties, called the seller, gives the thing and passes the title to it in exchange for a certain price in current money." Bouv. Law Dict. It differs from an exchange, where the consideration is paid in property other than money. In Parsons on Contracts, vol. 1, p. 520, it is said: "A sale is distinctly discriminated in many respects from an exchange in law; an exchange being the giving of one thing and the receiving of another thing, while a sale is the giving of one thing for that which is a representation of all values." See, also, Vail v. Strong, 10 Vt. 457. When, therefore, J. W. Moorhead undertook to take a patent-right in part consideration, he undertook to do what he had no authority to do, and the plaintiff should have known it. The trade was, therefore, void. It differed in no respect from what it would have been if there had been no power of attorney. There being no sale, the money received could not be regarded as secured in pursuance of a sale, and it not coming actually into Thomas L. Moorhead's hands he was not affected by the receipt of it by J. W. Moorhead. We think, then, that the court erred in charging the land with a lien for this money. * * *

Reversed.

[98] The agent has no implied authority to accept payment in any other medium than money. He may not accept drafts, notes, or checks. Ormsby v. Graham, 123 Iowa, 202, 98 N. W. 724 (1904). Nor a certificate of deposit. Wilkin v. Voss, 120 Iowa, 500, 94 N. W. 1123 (1903). Nor bonds. Paul v. Grimm, 165 Pa. 139, 30 Atl. 721, 44 Am. St. Rep. 648, 35 Wkly. Notes Cas. 451 (1895), containing a review of the cases and many illustrations of the rule. Nor a cancellation of a debt against the agent; Catterall v. Hindle, L. R. 1 C. P. 186 (1866); Hunter v. Eastham, 95 Tex. 648, 69 S. W. 66 (1902). Nor goods, wares, and merchandise. Lumpkin v. Wilson, 52 Tenn. (5 Heisk.) 555 (1871). If the consideration be anything else than money, it is not a sale, but a barter or exchange. Coulter v. Portland Trust Co., 20 Or. 469, 26 Pac. 565, 27 Pac. 266 (1891); Id., 23 Or. 131, 31 Pac. 280 (1892), with an interesting review of authorities; Skirvin v. O'Brien, 43 Tex. Civ. App. 1, 95 S. W. 696 (1906). The money must pass current; Confederate money will not do. Turpin v. Sansom, 36 Tex. 142 (1872).

FULLERTON v. McLAUGHLIN.

(Supreme Court of New York, General Term, Third Department, 1893. 70 Hun, 568, 24 N. Y. Supp. 280.)

Action to compel defendant to convey certain premises by virtue of a written contract made between the parties, in which one La Fountain had afterwards filled in some descriptions, terms $10 cash, balance in one year or the contract to be void. The cash was paid, but the agent extended beyond one year the time for payment of the balance.

The opinion of PUTNAM, J., at circuit, was as follows:

I think that all the evidence in, and facts of, the case, indicate that La Fountain was, to a certain extent, the agent of the defendant. The contract was drawn with a blank space left, to be filled in with a proper description of the lots agreed to be conveyed; and I infer from the evidence that La Fountain, as defendant's agent, was authorized to write in the contract the proper description of the lots, and hence that the contract, as read in evidence, was a valid and authorized contract. But although La Fountain was an agent of defendant, to make the contract, that fact did not give him, either actually or presumptively, any authority to cancel, extend, or modify it. The admission of defendant, proved by several witnesses, that "Mr. La Fountain did all his business for him," should be deemed to apply to the business then being discussed and transacted—the making of contracts for the sale of lots. The contract being made, and the right of the parties fixed and determined by the writing, the admission of defendant should not be construed to mean that La Fountain had authority to modify or extend or change the contract. When this written contract was made, the agency must be deemed to have ceased, in the absence of competent evidence of its continuance. It was for the plaintiffs to show such continuance. Under well-settled principles, they could not show such continuance by the agent's declarations. But they show it in no other manner. The plaintiff Mould testified that the first time he saw defendant, after the making of the contract, the latter said that La Fountain was not authorized to extend the contract, or to act as his agent. I conclude, therefore, that plaintiffs fail to show a valid extension of the time to perform the contract. They show the agency of La Fountain to the making of the contract. But such agency does not give him power to modify, change, or extend it. See Brewster v. Carnes, 103 N. Y. 556, 9 N. E. 323; Ritch v. Smith, 82 N. Y. 627; Bickford v. Menier, 107 N. Y. 490, 14 N. E. 438; Edwards v. Dooley, 120 N. Y. 551, 24 N. E. 827; Smith v. Kidd, 68 N. Y. 130, 131, 23 Am. Rep. 157.

By the terms of the contract, plaintiffs were to pay the balance of the purchase price one year from its date, and if said money was not

then paid the contract should be null and void. I think, therefore, that the time of the payment was of the essence of the contract. Wells v. Smith, 2 Edw. Ch. 78; 7 Paige, 22, 31 Am. Dec. 274. Hence, the time of payment being, by the terms of the contract, material, and strict fulfillment of the terms of the contract not having been waived or extended by defendant, I conclude that plaintiffs are not entitled to a specific performance. The complaint should be dismissed, with costs.

Argued before MAYHAM, P. J., and HERRICK, J.

HERRICK, J. It seems to me that this case should be affirmed, upon the opinion of the court below. The agency proved, it seems to me, did not grant power to extend or modify the written contract.[99]

IV. To Collect

(A) In General

BARRETT v. DEERE.

(Nisi Prius in the Court of King's Bench, 1828. Moody & Malkin, 200, 22 E. C. L. 507.)

Assumpsit for goods sold and delivered. Defense payment. The money had been paid to a person, sitting in plaintiff's counting-house behind the railing, with account books near him. This person gave a receipt, signed W. Long. In fact, no such person was employed about the place.

Lord TENTERDEN, C. J. The only question for the jury is, whether the sum of £6. 16s. was paid at the plaintiff's counting-house or not? If it was, the defendant is entitled to a verdict. If he were not, the consequences would be very serious. In a great place of business like

[99] Authority to an agent to sell land does not per se confer authority to rescind and cancel the contract of sale. West End Hotel & Land Co. v. Crawford, 120 N. C. 347, 27 S. E. 31 (1897). Nor does authority to sell at a fixed price, or in a given manner, give any power to sell at any other price. National Iron Armor Co. v. Bruner, 19 N. J. Eq. 331 (1868); Dayton v. Buford, 18 Minn. 126 (Gil. 111) (1872). Nor in any other manner. Rice v. Tavernier, 8 Minn. 248 (Gil. 214), 83 Am. Dec. 778 (1863). Though when the principal leaves discretion with the agent he will be bound, even though the agent sell for less than the amount he has suggested. Sprigg's Ex'rs v. Herman, 6 Mart. (N. S.) 510 (1828).

Moreover, the authority must be exercised within a reasonable time. Matthews v. Sowle, 12 Neb. 398, 11 N. W. 857 (1882). If a considerable time elapses, conditions may have changed so as to raise a presumption that the principal no longer holds the agent out as having authority. Wasweyler v. Martin, 78 Wis. 59, 46 N. W. 890 (1890).

The agent, of course, cannot fix terms for his own advantage, even though no fraud is intended and no injury results. Finch v. Conrade's Ex'rs, 154 Pa. 326, 26 Atl. 368, 32 Wkly. Notes Cas. 196 (1893); Hill v. Helton, 80 Ala. 528, 1 South. 340 (1886), post, p. 773.

this, no transactions could be carried on, if it were not sufficient for a purchaser to send his money to the seller's place of business, and pay it to any person whom he finds there, whether actually authorized to receive it or not, who appears to be intrusted with the conduct of the business. The debtor has a right to suppose that the tradesman has the control of his own premises, and that he will not allow persons to come there and intermeddle in his business without his authority.[1] If, therefore, the jury are of opinion that the payment was made at the plaintiff's counting-house, their verdict must be for the defendant.

Verdict for the defendant.

BUTMAN v. BACON.

(Supreme Judicial Court of Massachusetts, 1864. 90 Mass. [8 Allen] 25.)

Plaintiff left her bank book with her mother to enable her to draw or deposit on her account. Defendant, her brother, asked a loan of $150, and plaintiff sent the mother an order on the account. The brother tried to show that he had repaid the loan to the mother.

PER CURIAM. The evidence offered contains no express words by which the plaintiff constituted her mother her agent to receive payment of this debt. Nor is the power to receive it implied by the agency which the evidence tended to prove; for that agency related to other matters, and was not general, but limited to those matters.

Exceptions overruled.

(B) Implied from Possession of Notes or Securities

ROBERTS v. MATTHEWS.

(High Court of Chancery, 1682. 1 Vernon, 150.)

The case was, the defendant Matthews employed one Smith a scrivener to place out £50. for him at interest, which the scrivener did to the plaintiff, and took the plaintiff's bond for it in the defendant's name; and about three months afterwards delivered the bond to the defendant. Plaintiff Roberts all along paid his interest to the scrivener, and about five years after the entering into this bond, the scrivener calling upon him for the principal, he paid £30. of it,

[1] Payment to a clerk in a country store while the employer is absent is good. Davis v. Waterman, 10 Vt. 526, 33 Am. Dec. 216 (1838). See, also, Gardiner v. Davis, 2 Car. & P. 49, 12 E. C. L. 444 (1825), in which the agent was allowed to trade in his own name. As to a shopman authorized to receive payment over the counter, who receives money elsewhere than in the shop, see Kaye v. Brett, 5 Ex. 269, 19 L. J. Ex. 346 (1850). As to payment to a clerk of demands having no connection with the business, see Bowen v. School Dist., 36 Mich. 149 (1877).

and the scrivener not having the bond in his custody, gave the plaintiff a receipt for £30. received in part for the use of the defendant Matthews.

Adjudged this was a void payment; for the bond being in the custody of the defendant Matthews, and not in the scrivener's, the plaintiff ought to have seen his money indorsed on the bond; and though this alone were enough to make it an ill payment, yet this case was the stronger; for that the plaintiff was not ignorant whose money it was; the receipt he took for the payment of the £30. being for the use of the defendant. And many precedents were cited to the same purpose.

MARTYN v. KINGSLEY.

(High Court of Chancery, 1702. Finch, Precedents in Chancery, 209.)

In this case a difference was made, where a man trusts his scrivener (who puts out money for him) with the custody of his bond, and where with the custody of his mortgage; in the first case, if he receive the money, and delivers up the bond, this shall bar the obligee; not so in the case of a mortgage, because a legal estate is vested, which cannot be divested without assignment.

WOLSTENHOLM v. DAVIES.

(High Court of Chancery, 1705. 2 Freeman, Ch. 289, 2 Eq. Cas. 709.)

The plaintiff having borrowed £100. of the defendant's testator upon bond, which was procured by Williams, a scrivener in the Old Bailey; when the bond was sealed, it was delivered to the obligee; the plaintiff paid several years interest to Williams, the scrivener, and £50., part of the principal money, which the scrivener paid to the obligee, but the last £50. of the principal money being paid to the scrivener, he broke before he paid it to the obligee; and the question was, whether Sir Jo. W. the plaintiff was to lose the money, or the obligee? And the Master of the Rolls said, that it was the constant rule of this court, that if the party, to whom the security was made, trusted his security in the hands of the scrivener, that payment to the scrivener was good payment, but if he took the security into his own keeping, payment to the scrivener would not be good payment, unless it could be proved that the scrivener had authority from the party to receive it; and although in this case the scrivener had received the interest and part of the principal, and paid it to the obligee, yet that did not imply that he had any authority to receive it; but as long as he paid it over, all was well, and any one else might have carried to the party as well as he; and the plaintiff not proving that

the scrivener had any authority from the obligee to receive, he was forced to pay the last £50. again, although the Master of the Rolls declared that he thought it a very hard case.

CURTIS v. DROUGHT.[2]

(High Court of Chancery in Ireland, 1828. 1 Molloy, 487.)

D. Robert, the common agent of Margaret Bradford and of Thos. Drought, negotiated a loan of £300. by the former to the latter, taking and delivering to Miss Bradford a bond therefor. Drought regularly paid the interest, and finally the principal, to Robert. In 1816 she died and her executor sues on the bond.

HART, Ld. Ch.[3] * * * As to the acquittance of the debtor by the agent, if one employs an agent to lend money, and take a security which he delivers to his principal, he has no authority to discharge the debtor.

No one would be safe if an attorney who was employed to take a security for money could be permitted to say he had received back the amount and discharged the debtor. There has often been a question touching the extent of the authority of an agent who has been permitted to hold the security in his hands, whether he had power to cancel the security and discharge the debt; and there are some cases of great nicety upon that. Martyn v. Kingsley, Pre. Ch. 209, ante, p. 416. But it has never been heard of when the owner has had the precaution to take the instrument containing the evidence of the debt into his own custody, that the agent then had authority to receive the amount and give a valid acquittance. * * *

JOY v. VANCE.

(Supreme Court of Michigan, 1895. 104 Mich. 97, 62 N. W. 140.)

Bill to foreclose a mortgage. Defense payment. Complainants purchased the mortgage and four accompanying notes, and as the interest notes fell due, sent them to the Michigan Mortgage Company for collection. The Vance mortgage became due February 28, 1891. March 11, 1892, Vance paid the mortgage, taking a receipt of the Michigan Mortgage Company in full. The latter failed to pay it to complainant and soon after failed.

[2] Accord: Whitlock v. Waltham, 1 Salkeld, 157 (1708).

[3] Part of the opinion is omitted.

HOOKER, J.[4] * * * The case is reduced, therefore, to the single question of the authority of the Michigan Mortgage Company to receive the money upon the mortgage. Unless we are to say that the collection of the interest through this company, from time to time, constituted it an agent for the collection of subsequent installments of interest and the principal, we cannot deny complainants the relief sought.[5] Vance admits he paid the interest to the company without taking the trouble to ascertain whether they had the mortgage or who owned it. When he paid the mortgage, he was satisfied with the statement that the mortgage was mislaid, although he received a receipt which indicated that it did not belong to the company to whom he was paying it. It was perhaps the natural thing for him to pay it, in reliance upon the statement of these men with whom he was acquainted and in whom he had confidence; but his rights must depend upon their authority to receive the money, not upon his confidence in them.

Defendants' counsel claim that there was a general authority to collect from the fact that Mr. Cutcheon was in the habit of having this company make collections for his clients, including this estate for which he had purchased several mortgages from the company. The authority of the company does not depend upon the amount of busi-

[4] Part of the opinion is omitted.

[5] As to the implied authority of an agent authorized to collect the interest, to receive the principal also, see Security Co. v. Graybeal, 85 Iowa, 543, 52 N. W. 497, 39 Am. St. Rep. 311 (1892); Doubleday v. Kress, 50 N. Y. 410, 10 Am. Rep. 502 (1872); Wilson v. Campbell, 110 Mich. 580, 68 N. W. 278, 35 L. R. A. 544 (1896). One may be willing to intrust to the agent the collection of the interest, and unwilling to place in his hands the collection of the principal note. White v. Madigan, 78 Minn. 286, 80 N. W. 1125 (1899). When one bond is left with the agent, and the others are not in his possession, the agent has authority to collect the one, but not the others. Ward v. Smith, 7 Wall. 447, 19 L. Ed. 207 (1869). And when the third person makes various payments he will be protected as to payments made while the securities are in the agent's possession, but not as to payments made after the securities have left the hands of the agent. If estoppel is relied upon to show the authority, the third person must have known that the agent had the securities, though it is not necessary that he should have seen them. Crane v. Gruenewald, 120 N. Y. 274, 24 N. E. 456, 17 Am. St. Rep. 643 (1890). When the principal withdraws the instruments evidencing the debt, that is an implied revocation of the authority of the agent. Bloomer v. Dau, 122 Mich. 522, 81 N. W. 331 (1899). And it has even been held that the authority is revoked when the agent wrongfully assigns the debt to another party. Crane v. Gruenewald, supra. Neither mere authority to make a loan, Fortune v. Stockton, 182 Ill. 454, 55 N. E. 367 (1899); Antioch College v. Carroll, 11 Ohio Dec. (Reprint) 220 (1890); nor mere possession of the securities by an agent who has had no other connection with the loan, gives implied authority to collect the debt, Doubleday v. Kress, 50 N. Y. 410, 10 Am. Rep. 502 (1872); Union Cent. L. Ins. v. Jones, 35 Ohio St. 351 (1880); McMahon v. Germ. Am. Nat. Bk., 111 Minn. 313, 127 N. W. 7, 29 L. R. A. (N. S.) 67 (1910). Both conditions must concur. Central Trust Co. v. Folsom, 167 N. Y. 285, 60 N. E. 599 (1901). The mere fact that a note is payable at the agent's office amounts to a designation of the place of payment, but not of the person authorized to receive it. Klindt v. Higgins, 95 Iowa, 529, 64 N. W. 414 (1895); Caldwell v. Evans, 5 Bush, 380, 96 Am. Dec. 358 (1869); Ward v. Smith, 7 Wall. 447, 19 L. Ed. 207 (1869); Wood v. Merchant's Savings Loan & Trust Co., 41 Ill. 267 (1866).

ness done by it for the complainants, but upon the character and extent of the employment, as evidenced by the express authority conferred and the method of their dealing with it. Campbell v. Sherman, 49 Mich. 536, 14 N. W. 484. So far as shown, Mr. Cutcheon retained the custody of his papers, sending from time to time specific authority and directions for the performance of particular and designated acts. We search the record in vain for evidence that he gave a general authority to collect mortgages purchased or held by him. He found them profitable business acquaintances, for they had mortgages which he wished to buy; but he appears to have carefully managed the collections in a way which enabled him to keep track of them, as a prudent lawyer should for clients who confide their business to him. He had a right to suppose that the mortgagor would not pay notes or mortgage without receiving them, and by keeping them in his own hands he interposed the only practicable obstacle to the perpetration of a fraud by the mortgage company. Had the mortgagor been as careful to ascertain the authority of the company as the complainants were to restrict it, no one would have suffered. As it is, the loss should fall upon him, and not upon the complainants, who are in no way responsible for it.

The decree of the circuit court must be reversed, and one entered here for the complainants, as prayed in the bill, with costs of both courts.

SMITH v. KIDD.[6]

(Court of Appeals of New York, 1877. 68 N. Y. 130, 23 Am. Rep. 157.)

Action to foreclose two mortgages. The mortgages had been paid to one George, who was found by the trial judge to be the general agent of the plaintiff in the matter of investing, managing, collecting, and securing, both principal and interest, moneys belonging to plaintiff. George gave defendant a receipt, and promised to get the papers from Miss Smith, but he never did so, and later absconded.

RAPALLO, J.[7] * * * Laying out of view the subsequent dealings had by the plaintiff with George, in ignorance of his fraudulent conduct, it is very plain that there is no evidence, that at the time of this payment, April 1, 1867, George had any authority to receive the principal of these two mortgages as her attorney. Had this controversy arisen immediately after that payment it is clear that the

[6] Accord: Tappan v. Morseman, 18 Iowa, 499 (1865). When the third person attempts to show ostensible authority in the agent to collect, notwithstanding the securities are not in his possession, the burden of proof is on such third person, and if the evidence is such that different minds might reasonably draw different conclusions therefrom, then it is a question for the jury. Reid v. Kellogg, 8 S. D. 596, 67 N. W. 687 (1896).

[7] Part of the opinion is omitted.

defendant must have failed in his defense. Miss Smith, the plaintiff, was the only witness by whom he sought to prove actual authority, and she expressly negatived it. There was no evidence of apparent authority at that time, for George had never before undertaken to collect principal. The fact that the plaintiff, on the 31st of March, 1866, advanced the money to McKinney through George was no proof of authority to him to collect the principal, when she did not intrust him with the custody of the securities, but held them in her own possession. Neither was the defendant warranted by the fact of the attorney being authorized to collect the interest, in inferring that he was also authorized to receive the principal. Such authority in the absence of direct proof, may, in some cases, be inferred from the attorney having possession of the bond and mortgage, but in such cases it is incumbent upon the debtor who makes payments to the attorney, to show that the securities were in his possession on each occasion when the payments were made, for the withdrawal of the securities would be a revocation of the authority. Williams v. Walker, 2 Sandf. Ch. 325, and cases cited; Doubleday v. Kress, 50 N. Y. 410, 10 Am. Rep. 502.

The finding that George was the general agent of the plaintiff in the matter of collecting both principal and interest prior to, and at the time of, the payment in question, therefore, depends wholly for its support upon the subsequent transactions, from which a general agency is sought to be implied retroactively. These transactions consisted in the receipt by George of the interest on plaintiff's bonds and mortgages and his payment over of such interest to the plaintiff, while she retained possession of the securities. That authority to collect interest in such cases does not afford ground for inferring authority to collect principal, where the agent or attorney is not intrusted with the possession of the securities, was expressly adjudicated in Williams v. Walker, 2 Sandf. Ch. 325. That decision is abundantly sustained by authority and has frequently been cited with approval. It appears from the correspondence put in evidence, that it was the regular practice of George, whenever he made a loan, to send to the plaintiff for the money, and when the transaction was consummated to send her the bond and policy of insurance, and the mortgage when recorded.

The only instances in which he appears to have collected principal with her knowledge or sanction, occurred in 1869, 1870 and 1871, when it appears from written statements rendered by him to plaintiff, that he received the principal of certain mortgages and re-invested the proceeds in other mortgages, and in 1873 she sent him a mortgage for collection. These transactions having occurred long after the payment made by McKinney are not evidence of apparent authority on which he was authorized to rely, but are only available, if at all, as evidence of actual authority, and their force in this respect depends upon the circumstances under which the payments were made.

If, in these instances, the plaintiff placed the securities in his possession, or delivered satisfaction-pieces to him prior to his receiving the money, or otherwise expressly empowered him to collect the principal, they would afford no evidence of an actual general authority to collect mortgages not placed in his hands, or which he was not otherwise expressly authorized to collect, the question being one of actual authority and not apparent authority, by which the defendant's course was influenced. There is no evidence that George was not intrusted with the possession of the mortgages thus collected, or of satisfaction-pieces thereof, nor any evidence of the circumstances, except the testimony of the plaintiff herself, who testified that she never verbally or in writing gave to George any express authority to collect the principal of her mortgages generally, or at any time gave him authority to collect money for her generally. That mortgages were never paid to him, to her knowledge, by any person without her express authority and consent, and that the mortgages paid by her authority were satisfied of record by satisfaction-pieces signed by her for that specific purpose. This evidence was uncontroverted. * * *

But there are settled principles specially applicable to cases like the present, which render immaterial much of the inquiry in relation to implied authority. These are collated in Dunlap's Paley on Agency, p. 274, as follows, and seem fully to cover this branch of the case.

If money be due on a written security, it is the duty of the debtor, if he pay to an agent, to see that the person to whom he pays it is in possession of the security. For though the money may have been advanced through the medium of the agent, yet if the security do not remain in his possession, a payment to him will not discharge the debtor. Henn v. Conisby, 1 Ch. Cas. 93, note. And even the agent being usually employed in the receipt of money, does not in this instance constitute such authority as will serve the debtor. It has been so held in respect to money paid upon a bond to one who usually received money for the obligee, but who had not the custody of the bond in question (Gerard v. Baker, 1 Ch. Cas. 94), and even where the obligor had for several years paid the interest and part of the principal to an agent of the lender through whom the money had been borrowed, who had not the possession of the bond, but had regularly paid the money over to the obligee except the last payment, the obligor was adjudged to pay the last sum over again. For it was held, notwithstanding the hardship of the case, that the circumstance of the agent's having before received the interest and part of the principal, did not imply that he had any authority to receive it, but as long as he paid it over all was well, and any other might have carried it to the creditor as well as he. Wolstenholm v. Davies, 1 Freem. Ch. 289. In this case the master of the rolls said, that it was the constant rule of that court, that if the party to whom the security was made, trusted the security in the hands of the scrivener, payment to the scrivener was good payment, but if he took the security into his own

keeping, payment to the scrivener would not be good payment, unless it could be proved that the scrivener had authority from the party to receive it, and that such authority could not be implied from the fact that the scrivener had previously received principal which he had paid over to the obligor. See also Story, Agency, §§ 98, 104; Curtis v. Drought, 1 Molloy, 487.

These principles were applied in the case of Williams v. Walker, before cited, and although payments of principal had been made to the attorney while he had the bond and mortgage in his possession, and these payments were allowed, subsequent payments made to the same attorney when the bond and mortgage were not in his possession were disallowed, and it was held not to be incumbent upon the creditor to show notice to the debtor, of the withdrawal of the papers from the possession of the attorney, but that it was the duty of the party paying, on each occasion, to require the production of the bond.

It is clearly established that in the present case the securities were not confided to the attorney, but were in the plaintiff's possession at the time of the payment, and that McKinney paid without requiring their production. The case is much stronger than any of those cited, for it appears here, that George was at the time the attorney of McKinney, the receipts which he gave were not signed in the name of the plaintiff, and McKinney trusted to the promise of George to get the papers. And what was said in Henn v. Conisby, 1 Ch. Cas. 93, is peculiarly applicable. "The circumstance of the creditor keeping the security is conclusive. No man would pay the money due on a mortgage or bond without having the security given up. The debtor's payment to the scrivener without taking up his security was an evidence that he trusted the scrivener more than the creditor did, who always kept the security."

Any other principle would be dangerous in the extreme. If the fact that a capitalist makes investments on bond and mortgage through an attorney, and employs him to collect the interest, and in special cases authorizes him to collect the principal of particular mortgages, is sufficient to warrant a finding of a general authority to collect the principal of all the mortgages of the client, notwithstanding that the client takes the precaution to retain his securities in his own possession, no investor would be safe. Therefore the rule has, in the adjudicated cases, been strictly adhered to, that the possession of the securities by the attorney, is the indispensable evidence of his authority to collect the principal (1 Molloy, 487), and that whoever pays him without that evidence does so at his own risk, unless he can prove express authority aliunde, and that the fact that the agent has, on other occasions, received principal which he has paid over to his client is not, in this instance, proof of such authority.

In regard to the $2,400 mortgage, this case presents the further feature, that at the time of the payment, the mortgage had still four years to run. No authority to change the terms of the contract can

be implied from the fact that it was originally made through the attorney, and there is no evidence in this case of any such authority. Even though an agent have authority to receive payment of an obligation, this does not authorize him to receive it before it is due. Campbell v. Hassel, 1 Stark. 185; Parnther v. Gaitskell, 13 East, 437, 438; Story, Agency, § 98; Doubleday v. Kress, supra; Fellows v. Northrup, 39 N. Y. 121, 122; 2 Greenl. Ev. § 64.

For all these reasons we are of opinion that the finding that George had authority to receive the principal of the mortgages cannot be sustained. * * *

The plaintiff seems to be entirely free from fault. She took her bonds and mortgages into her own custody and retained them, and had a right to rely upon the rule of law, that although she might allow her attorney to collect the interest, he would have no power to collect the principal without special authority, so long as she did not intrust him with the papers. McKinney seems to have confided in George, who was also his attorney, and to have been willing to place the money in his hands, trusting to his promise to get the papers; and without inquiry into his authority, or any ostensible authority, seems to have reposed for years upon the promise of George, without inquiring whether the papers had been obtained or the mortgages satisfied, or calling upon the plaintiff to satisfy them. One of the parties must suffer from the fraud of George, and we think that on the facts now before us, the loss has resulted from the negligence of McKinney or from his confidence in George, and not from any appearance of authority conferred upon him by the plaintiff, by which the defendant was misled.

The judgment must be reversed and a new trial ordered, with costs to abide the event. All concur except CHURCH, C. J., dissenting.

HARRISON NAT. BANK OF CADIZ, OHIO, v. AUSTIN.

(Supreme Court of Nebraska, 1902. 65 Neb. 632, 91 N. W. 540, 59 L. R. A. 294, 101 Am. St. Rep. 639.)

Suit to foreclose a mortgage. One Burr conducted an extensive loan agency in Nebraska, defendants and others furnishing him the money, and buying from him notes and mortgages made out to him and by him indorsed and assigned and delivered to plaintiffs, and other lenders. The note and mortgage in question was one of many on which Burr had collected interest and principal, and failed to account for the principal.

KIRKPATRICK, C.[8] * * * From the correspondence in the record, and from other testimony, it is quite clearly established that Burr was permitted by appellant to manage these loans, collect both

[8] Part of the opinion is omitted.

principal and interest, in all respects as though they were his own, appellant having apparently neither knowledge nor concern about the borrowers themselves. The officers of the appellant bank testify that these coupons and notes were sent to Burr for payment on account of his indorsement, and not for collection.

It is suggested by counsel for appellee, and, we think, aptly, that this claim of appellant is not consistent with sound business principles, nor is it the usual method pursued by banks having paper for collection. These notes and mortgages were made payable at the First National Bank at Lincoln, and the uniform custom of appellant in sending them to Burr instead of the bank cannot be reconciled with reason and sound business methods if the contention of appellant that they were sent to Burr as indorser or guarantor is to be credited. The fact that they were uniformly sent to Burr, taken in connection with the letters from appellant to Burr appearing in the record, showing, as they do, the custom of looking to Burr for the collection of overdue paper, quite conclusively establishes the contention of counsel for appellee that Burr was the agent of appellant, and was so regarded by it.

Appellant seems to have availed itself of Burr's services in making these collections, placing loans, and foreclosing mortgages, until it was discovered that Burr was in failing circumstances; and this, it appears from the record, was a discovery made more than a year after the note and mortgage in suit had been paid. It was then that appellant made an investigation of its business in Burr's hands, and found that he had misappropriated some $16,000. Burr testified that the officers of appellant bank were in Lincoln on different occasions, staying in some instances several days, visiting at his office, and that they must have known of the manner in which he was doing business for them. It is true that Burr did not have the note and mortgage in suit in his possession at the time he made the collection; nor did he have them again after sending them to appellant; but this is only one of the circumstances which are to be taken into consideration in determining whether or not Burr was in fact the agent of appellant in the collection of the note and mortgage in suit. In the case of Insurance Co. v. Walter, 51 Neb. 182, 70 N. W. 938, this court said: "That the party to whom money due another is paid is not in possession of the instrument by which the indebtedness is evidenced is not conclusive of the question of the authority or lack of it in the party receiving the money to collect it." To the same effect is Estey v. Snyder, 76 Wis. 624, 45 N. W. 415; and Dunn v. Hornbeck, 72 N. Y. 87.

Although this note and mortgage, as well as other farm mortgages handled by Burr on behalf of appellant, were made payable at the First National Bank at Lincoln, appellant saw fit to send the note and mortgage direct to Burr for collection, and allowed him to deal with the borrowers for a number of years in all respects as though he was the owner of the mortgages. In the case of Johnston v. Investment Co., 46 Neb. 480, 64 N. W. 1100, ante, p. 322, this court said: "Where

a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, would be justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped as against such third person from denying the agent's authority." Holt v. Schneider, 57 Neb. 523, 77 N. W. 1086.

In the case at bar the apparent authority with which appellant clothed Burr, even if he was not in fact its agent, and the acceptance by appellant of all the benefits of his acts on its behalf, is such that justice requires that in this case appellant should sustain the loss. It conclusively appears from the exhibits in this case that Burr did frequently collect both principal and interest at the times when he did not have the notes or the coupons in his possession, remitting the amounts collected to appellant, who thereupon returned to him for delivery to the borrower the canceled evidences of the debts, and who in no instance objected to this course on the part of Burr. In Bank v. Ridpath, 47 Neb. 96, 66 N. W. 37, this court said: "When the extent of an agent's authority is in issue, no special instructions having been given him, his actual authority to do a particular act in connection with the transaction may be inferred from proof that the principal had authorized or ratified similar acts in connection with past transactions of the same character, and intrusted to the agent under similar circumstances." The testimony in the record is sufficient to establish the fact found by the trial court that Burr was the general agent of appellant in Nebraska for the negotiation and collection of farm loans which it had made through Burr, and the right to collect the note before due sufficiently appears from his custom, ratified by appellants, of granting extensions, and renewals of other loans. This he apparently did wholly without objection on the part of appellant, and his acts concerning which were ratified by appellant when brought to its notice.[9]

[9] When the habit and course of dealing of the agent is shown to have been known to, and permitted by, the principal, this implied power may be broad enough to authorize the agent, not only to collect without the securities in his possession, but to collect before maturity, or to foreclose the mortgage. The various "Kelly Cases" in Minnesota well illustrate all the variations of the agent's powers. See Springfield Sav. Bank v. Kjaer, 82 Minn. 180, 84 N. W. 752 (1901), and the cases there discriminated; Thornton v. Lawther, 169 Ill. 228, 48 N. E. 412 (1897), a case of remarkable confidence reposed in the agent.

Possession of the securities, or the want of it, while a fact of great significance, is not in every case essential to determine implied power, or the lack of it, to collect the debt. Union Trust Co. v. McKeon, 76 Conn. 508, 57 Atl. 109 (1904).

While one having in his possession a negotiable paper indorsed in blank, or to his order, may transfer good title to it, yet, if he hold it as an agent, the principal will not be bound to third persons having knowledge of the agency, unless the act of the agent is within the scope of his authority. Merchants' & Manufacturers' Bank v. Ohio Valley Furniture Co., 57 W. Va. 625, 50 S. E. 880, 70 L. R. A. 312, ante, p. 306 (1905).

It appears that the findings and judgment of the trial court are sustained by sufficient competent evidence, and are right, and it is, therefore, recommended that the same be affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

(C) What Received in Payment

BARKER v. GREENWOOD.

(Court of Exchequer in Equity, 1837. 2 Younge & C. 414, 6 L. T. Ex. Eq. 54.)

ALDERSON, B. This was a bill filed by the plaintiff, claiming an account of certain monies paid by the defendant as the purchaser of an estate, sold by the late Rev. Mr. Barker to him, through the agency of a Mr. Churchill, a solicitor. The bill prays a declaration that there is a lien on the estate for the purchase-money remaining unpaid. There is no doubt that if the purchase-money remains unpaid, the plaintiff is entitled to the declaration and lien. There is no doubt, also, as to the payment of all the purchase-money except the sum of £7,675. 19s. 8d. As to that, the facts are these: A distinct authority was given to Churchill, with the assent of the plaintiff, to receive the purchase-money from the defendant. Now this sum of money was not actually paid; but was, on the 19th October, 1822, set off in an account between Churchill and the defendant, Churchill being indebted to the defendant to that amount at the time.

I think it is satisfactorily made out by the correspondence that Mr. Barker was indebted to Mr. Churchill in some amount, and intended that Mr. Churchill's debt should be paid, and only the balance of the moneys received by Churchill from the defendant paid over to himself.

I must also assume, for the present, which, however, as far as the facts are before me, is very questionable, that the amount of this debt, on the 19th October, 1822, was more than £7,675. 19s. 8d., the sum set off in account between Churchill and the defendant; and then the question is this—if a man, being indebted to his own agent, authorize that agent to receive money due to him from his debtor, intending that he should thereout pay himself his own debt, does he authorize that agent impliedly, to the extent at least of that debt, to receive payment in any way he may think fit? I think he does. An agent, with a general authority like this, is, as it seems to me, only bound to receive payment in such a way as thereby to put it in his power completely to discharge the duty he himself owes to his principal. If, therefore, he is bound to pay the whole over to the principal, he must receive it in cash from the debtor. And a person who pays such an agent, and who means to be safe, must see that the mode of payment does enable the agent to perform this, his duty. If, there-

fore, the agent be not a creditor of his principal, he must receive the whole in cash; for, otherwise, he does not, by the act done between him and the debtor, put himself into the situation of being able to pay it over.

Such were the cases of Todd v. Reid, 4 B. & Ald. 210; Russell v. Bangley, 4 B. & Ald. 395; Bartlett v. Pentland, 10 B. & C. 760; and Scott v. Irving, 1 B. & Ald. 605. For in those cases the assured was entitled, as between himself and the broker, to the whole amount which the latter might have received in cash from the underwriter. But if the agent be himself a creditor of the principal, and the principal intends, when he makes him his agent to receive, that he shall retain his own debt out of the sum received, his only duty is to pay over to the principal the balance, after deducting his own debt. If he therefore takes care to receive in cash that balance, he, as it seems to me, puts himself into a situation as completely to discharge his duty as if he had received the whole in cash. For what possible difference can it make to the principal whether his agent receives the whole and retains part, or only receives that balance which he himself is entitled to receive from the agent? A person however who does not take the ordinary and proper course of paying the whole in money, must take care to be able to prove that the agent is in this situation. If, therefore, he pays by a settlement in account, he takes upon himself, in such a case as this, the risk of being able to shew the debt due from the principal to the agent, and the specific circumstances under which the agent was appointed to receive the money. Here these circumstances are made out, but still he must shew that there was a debt due to Churchill from Mr. Barker, equal at least to the sum set off in account between himself and Churchill.[10]

[10] The agent has no implied power to accept merchandise in payment. Pollock v. Cohen, 32 Ohio St. 514 (1876); Hays v. Lynn, 7 Watts, 524 (1838). Nor a bill of exchange, nor a note. Ward v. Evans, 2 Ld. Raym. 928 (1703); Robson v. Watts, 11 Tex. 764 (1854). This is especially true if the merchandise is for the personal use of the agent. Walton Guano Co. v. McCall, 111 Ga. 114, 36 S. E. 469 (1900); Sweeting v. Pearce, 7 C. B. N. S. 449; 29 L. J. C. P. 265, 97 E. C. L. 449 (1859). Cf. Dusenberry v. McDole, 42 Wash. 470, 85 Pac. 40 (1906), in which the course of dealing and the appearance of authority in the agent were held to bind the principal by a payment to the agent in grain; Nichols & Shepard Co. v. Hackney, 78 Minn. 461, 81 N. W. 322 (1900); in which acceptance of a note was within the authority; and Hurley v. Watson, 68 Mich. 531, 36 N. W. 726 (1888), in which the general rule is stated with clearness and vigor. No usage can sanction a practice to set off payment due to a principal on the agent's indebtedness to the third person. Todd v. Reid, 4 B. & Ald. 210, 6 E. C. L. 455 (1821); McAlpin v. Cassidy, 17 Tex. 449 (1856), ante, p. 347.

Special emergencies may justify an inference of broader power in an agent, as, e. g., when an agent was given "full authority to act for" a creditor of an insolvent debtor, and took personal property in satisfaction of the debt. Oliver v. Sterling, 20 Ohio St. 391 (1870); or when an agent threw off $200 in settling a mortgage, where the property was not worth more, and no more could have been collected, Reed v. Northrup, 50 Mich. 442, 15 N. W. 543 (1883). Even in such a case, however, the settlement must be in accord with the ordinary mode of business under the circumstances. McAlpin v. Cassidy, 17 Tex. 449 (1856).

I propose therefore to refer this question to the Master, namely, whether, on the 19th of October, 1822, Barker the testator was indebted to Churchill in any and what amount. If the defendant can shew to the Master's satisfaction that there was such a debt then due, and that it exceeded or equalled the sum set off in account between him and Churchill, this bill will be dismissed; but certainly without costs, because the bill was most properly filed to compel such proof being given, and its necessity arose from the unusual mode of settlement adopted by the defendant. If, however, the defendant cannot satisfy the Master of this, the plaintiff will be entitled to a declaration that he is to have a lien for the whole, if there be no debt—for the balance, if the debt due to Churchill at the time in question (for the subsequent accounts between Barker and Churchill are wholly immaterial) was less than the sum set off in account between Churchill and the defendant, and will have a decree with costs to that effect.

DIXON v. GUAY.

(Supreme Court of New Hampshire, 1900. 70 N. H. 161, 46 Atl. 456.)

Action for possession under landlord and tenant act. The tenant had given the landlord's agent in payment of two months' rent a bank book of deposit for the amount. Judgment for plaintiff and defendant excepted.

PARSONS, J. "That the power of a collecting agent by the general law is limited to receiving for the debt of his principal that which the law declares to be a legal tender, or which is by common consent considered and treated as money, and passes as such at par, is established by all the authorities.[11] The only condition they impose upon the principal, if anything else is received by his agent, is that he shall inform the debtor that he refuses to sanction the unauthorized transaction within a reasonable period after it is brought to his knowledge." Ward v. Smith, 7 Wall. 447, 452, 19 L. Ed. 207; Todd v. Reid, 4 Barn. & Ald. 210; Bartlett v. Pentland, 10 Barn. & C. 760; Howard v. Chapman, 4 Car. & P. 508; Story, Ag. §§ 98, 413.

The case is within the rule laid down. Exception overruled.

11 "Illinois currency" is not money which the agent may accept. Graydon v. Patterson, 13 Iowa, 256, 81 Am. Dec. 432 (1862). Nor are depreciated notes of the banks of Virginia. Ward v. Smith, 7 Wall. 447, 19 L. Ed. 207 (1869). As to payment in Confederate money, see Hendry v. Benlisa, 37 Fla. 609, 20 South. 800, 34 L. R. A. 283 (1896); Fretz v. Stover, 22 Wall. 198, 22 L. Ed. 769 (1875).

MILLER v. EDMONSTON.

(Supreme Court of Judicature of Indiana, 1846. 8 Blackf. 291.)

DEWEY, J. At the February term, 1844, of the Dubois Circuit Court, Miller sued Edmonston on three sealed notes alleged to be lost, dated 26th April, 1832, each for $133.33⅓, one payable in twelve months, one in eighteen months, and one in two years. The parties submitted the cause to the Court upon the following agreed case:

The notes described in the declaration were executed by the defendant and one Morgan jointly and severally. On the 8th of June, 1836, Miller agreed by parol with Morgan, for a certain consideration, to give him further time on the notes until the 25th of January following. On the 2d of August, 1841, the notes having been previously placed by Miller in the hands of an attorney at law for collection, without any special instructions, the attorney took from Morgan his unsealed note for $626, payable to Miller one day after date, and gave up to Morgan the three notes described in the declaration to be cancelled, and they were cancelled accordingly. Subsequently (but when does not appear), Morgan, at the request of the attorney, confessed a judgment to Miller on the substituted note, which judgment is still unsatisfied. Morgan afterwards died insolvent.

The Circuit Court rendered a judgment in favour of the defendant.

We do not think the judgment can be sustained. The granting indulgence by parol, whether upon a valid or an invalid consideration to one of two joint and several obligors, does not constitute a defence, at law by the other obligor against any part of the joint and several debt.

When a demand is placed in the hands of an attorney at law for collection, without any special instructions, the authority conferred upon, and the duty assumed by him, is to use due diligence to collect the debt by suit or otherwise. He has no authority to compromise with the debtor, and cannot bind his principal by any arrangement short of an actual collection of the money. The transactions of the attorney as stated in the record, therefore, were nugatory, and had no binding effect upon his principal, the plaintiff. The notes which were improperly surrendered and cancelled, nevertheless remain in force. Nor does the judgment confessed on the new note alter the case. The taking the judgment was equally unauthorized as the surrender of the old notes, and cannot merge them. Had it appeared that the plaintiff ratified the acts of his attorney, the result would have been different; but it is not shown that he even had a knowledge of the doings of the attorney.

PER CURIAM. The judgment is reversed with costs. Cause remanded, etc.

GRAHAM v. UNITED STATES SAVINGS INSTITUTION.[12]

(Supreme Court of Missouri, 1870. 46 Mo. 186.)

CURRIER, J. This suit is brought to recover the amount of two checks which were drawn on the defendant by third parties in favor of the plaintiffs and made payable to their order. The drawers delivered the checks to the plaintiffs' collecting agent, one Dixon, in settlement of certain bills which the latter had in charge for collection, being bills due from the drawer of the checks to the plaintiffs. Dixon indorsed the defendant's firm name upon the checks and presented them at the bank and drew the money upon them, which he seems to have appropriated to his own use, without rendering any account thereof to the plaintiffs. Thus far there appears to be no serious controversy about the facts.

If Dixon had authority, general or special, to indorse the checks in the manner stated, or the defendant was authorized to pay them without the personal indorsement of the plaintiffs, it is not contended that the defendant would be liable in this action. The verdict of the jury, however, negatives the supposition of the existence of any such express authority. The defendant nevertheless undertakes to deduce the authority from the nature and character of Dixon's general agency in making collections and the transaction of business in behalf of the plaintiffs. Their chief complaint of the action of the court below is founded upon the refusal of the court to give the following instruction, namely: "If the jury believe from the evidence that Charles Dixon was, at the times stated in the petition, the clerk and collector of the plaintiffs, and that, as such, he received from the plaintiffs, among other accounts for collection, two accounts, one against Kramer & Loth, and one against Erfort & Petring, and that he was fully authorized and empowered to receive payment of and receipt said bills or accounts, and that, in pursuance of his duties and authority, he received in payment of such accounts the checks set out in the petition, and afterward collected the money on said checks from defendant, in accordance with his authority to collect said accounts, then they will find for the defendant."

The logic of this instruction is that Dixon was authorized to indorse and collect the checks since he was authorized to receive them in lieu of cash in payment of the bills he held for collection. The deduction is a non sequitur. The checks required the bank to pay the sums therein specified to such person as the payees might direct. But the payees never directed payment to be made to any one, unless Dixon was their agent for that purpose; and such agency is not inferable from the mere fact that he was their agent in effecting the collection, nor from all the facts recited in the instruction. His pri-

[12] Accord: Deering & Co. v. Kelso, 74 Minn. 41, 76 N. W. 792, 73 Am. St. Rep. 324 (1898).

mary duty was to collect the bills, not the checks given in adjustment of the bills.

The question presented is purely one of agency. Was Dixon the plaintiffs' agent to indorse negotiable paper given in settlement of debts due to his employers? He was their agent to adjust such claims and receive the amounts due upon them, and to do those subordinate and incidental things usual and customary in the accomplishment of the main purpose had in view, to-wit: the collection. That main purpose had been accomplished when he had received the checks payable to his principals. His duties as a collector ceased at that point.[18] His next duty was to account with his employers for the proceeds of his collections, and turn over the checks to them, to be disposed of as they might judge proper. The indorsement of the checks was no necessary incident of the collection of the accounts. The instruction was, in my opinion, properly refused. So was the defendant's second instruction. It traveled out of the issues made by the pleadings. At the instance of the defendant, the court directed the jury to find for it in case they found from the evidence that Dixon was authorized to collect and receive payment of checks payable to plaintiffs at the time the checks in question were presented and paid. This fairly presented the real point in controversy, and in the form selected by the defendant's counsel.

The judgment will be affirmed. The other judges concur.

(D) To Modify Terms of Payment

TOOTLE v. COOK.

(Court of Appeals of Colorado, 1893. 4 Colo. App. 111, 35 Pac. 193.)

Action by plaintiffs to recover a balance due for goods sold and delivered to Cook & Davis, a partnership. The partnership had been dissolved and Davis had agreed to pay this bill. As it was not paid, plaintiffs drew on defendants at 5 days sight, and sent the draft to the bank for collection. The bank, knowing of the dissolution of

[18] If the agent's authority empowers him to cash negotiable paper, he still has no power to transfer it to a third person to collect. Rigby v. Lowe, 125 Cal. 613, 58 Pac. 153 (1899). As to his right to receive and transmit to his principal checks and drafts, see Griffin v. Erskine, 131 Iowa, 444, 109 N. W. 13, 9 Ann. Cas. 1193 (1906), in which it was pointed out by the court that checks and other bills of exchange are the means of transferring money in nearly all commercial transactions, and in authorizing an agent to make collections, he may be assumed to have authority to transmit funds in the ordinary way. Though such paper will not absolutely cancel the debt, it is conditional payment, good from date of delivery if the paper is honored, but no payment at all, if not honored. If the agent has authority to take a note in payment, he has not thereby authority to collect that note eight months later. Howard v. Rice, 54 Ga. 52 (1875). For many illustrations, see Scarborough v. Reynolds, 12 Ala. 252 (1847).

the partnership, took the acceptance of Davis alone, retained the drafts, and allowed Davis to make payments from time to time until he became insolvent. Cook had no knowledge of this draft. Judgment for defendants.

THOMSON, J.[14] * * * There is no question that the bank was the agent of plaintiffs, and hence the argument that when it took the individual acceptance of Davis upon the draft against Cook & Davis, with knowledge that the firm of Cook & Davis had ceased to exist, the plaintiffs were bound by its act, the effect of which, as urged, was to discharge Cook. The mere taking of the acceptance of Davis, alone, would probably not have the effect claimed, but it is needless to consider that question here. A principal is not bound by the acts of his agent, unless they are done within the scope of his authority, in the transaction of the business of his principal. So, also, in order that a principal may be affected by his agent's knowledge, the knowledge must be acquired while he is agent, and must pertain to the business in which he is authorized to act. The bank was the agent of plaintiffs for the collection of the draft. No authority is shown in the bank, except the general authority which accompanies the forwarding to it of an instrument for collection. Under that authority it could collect the money due, and if it had done so the debt would have been discharged, notwithstanding the bank might have failed to forward the amount to the plaintiffs. But it had no power to compound the indebtedness, or release a debtor, or receive anything except money in payment, or do anything whatever which would operate to change the rights of the creditors or the liabilities of the debtors.[15] Under this general authority, it could present the draft for acceptance, in accordance with its terms, but it could not bind the drawers by receiving a defective acceptance. The knowledge, therefore, which the bank had of the dissolution, or its act in taking the acceptance of one drawer, and not of the other, or any other act outside of the general authority which it had, cannot for a moment affect the prior relations between the defendant partnership and the plaintiffs. * * *

Reversed.

[14] Part of the opinion is omitted.

[15] An attorney to collect and receive payment has no power to compromise or sell the claim, Geiger v. Bolles, 1 Thomp. & C. 129 (1873); nor to commute the debt, nor to pledge it, Padfield v. Green, 85 Ill. 529 (1877); nor to extend the time of payment, Powell v. Henry, 96 Ala. 412, 11 South. 311 (1892); nor to do anything short of an actual collection of the money, Corbet v. Waller, 27 Wash. 242, 67 Pac. 567 (1902). While he may use the ordinary and necessary means of collecting, as to retain counsel and bring suit, Ryan v. Tudor, 31 Kan. 366, 2 Pac. 797 (1884), and make his principal liable for the method used, if authorized, Caswell v. Cross, 120 Mass. 545 (1876), yet he cannot settle in any other way than the one authorized, Powell's Adm'r v. Henry, 27 Ala. 612 (1855). To compound the debt for less than is due is an evidence of fraud, and the debtor may then have to pay again. Penn v. Browne, 2 Freem. C. C. 214 (1697).

V. To Give or Receive Negotiable Paper

(A) In General.

EXCHANGE BANK v. THROWER.

(Supreme Court of Georgia, 1903. 118 Ga. 433, 45 S. E. 316.)

Lamar, J. Authority to borrow money is among the most dangerous powers which a principal can confer upon an agent. Whoever lends to one claiming the right to make or indorse negotiable paper in the name of another does so in the face of all the danger signals of business. He need not lend or discount until assured beyond doubt that the principal has in fact appointed an agent who by the stroke of a pen may wipe out his present fortune, and bind his future earnings. The very nature of the act is a warning, and if the lender parts with his money, he does so at his own peril. If the power was not in fact conferred, he must bear the loss occasioned by his own folly. A power so perilous is not to be implied from acts which in other matters less hazardous might create an agency. It must be conferred in express terms, or be necessarily and inevitably inferable from the very nature of the agency actually created. So strict is the rule that it will not be presumed even from an appointment of one as general agent, unless the character of the business or the duties of the agent are of such a nature that he was bound to borrow in order to carry out his instructions and the duties of the office. Civ. Code, §§ 3004, 3021; Dobbins v. Etowah Mfg. Co., 75 Ga. 238; Mechem on Agency, § 536; Tappan v. Bailey, 4 Metc. 536; Jackson Co. v. Com. Nat. Bk., 199 Ill. 151, 65 N. E. 136, 59 L. R. A. 657, 93 Am. St. Rep. 113; Doubleday v. Kress, 50 N. Y. 410, 10 Am. Rep. 502.

While the agent here was given the rather high title of "cashier," that, of itself, did not clothe him with the powers which might have been exercised by an officer bearing that title if employed by a bank. In view of the reluctance with which the law presumes the existence of the power to borrow, this title will be considered to indicate that he was a cash keeper, rather than a cash borrower. Nor will the fact that he was authorized to fill out the blank, and indorse drafts with a rubber stamp reading, "Pay to the order of the Third National Bank for deposit. James T. Prince, Manager, by ———, Cashier," be treated as authority to indorse in blank. On the contrary, the character of the stamp itself indicated that the principal only authorized a restricted indorsement for the mere purpose of allowing the bank, rather than the agent, to collect. It does not import a general authority to indorse, nor does possession of the draft indi-

cate that the agent had the right to discount the draft or collect the proceeds.[16]

The stringent rules of agency are intended to protect a principal against unauthorized acts, but not to shield one who has in fact conferred such authority, or ratified his conduct. Here the plaintiff denied that any authority had been given further than that implied in conferring the title "cashier," and the right to use the stamp above copied. It denied that Prince had knowledge of the conduct on the part of Brinsfield, or that he in any manner ratified the indorsements or collections which were shown to have been made by him. The testimony for the defendant was to the contrary, and was to the effect that the trouble was not so much a want of authority to indorse, as the improper use Brinsfield made of the money after it was collected; that he was a general agent, indorsing drafts, handling the cash, paying out money, occasionally drawing checks, and in full and complete charge of the business during the frequent and necessary absences of the principal; that he had discounted another draft with Thrower some months before, for $394, which was paid without objection; that on these and other like drafts, indorsed in the same way, of which Prince denied knowledge, Brinsfield had collected some $8,500, which he had appropriated to his own use; that he originally wrote the indorsements in his own handwriting before the stamp above referred to was prepared; and that there were other stamps in the office used by him, on which the words "for deposit" were wanting, apparently contemplating that he had authority to indorse in blank and to collect.

The evidence, while conflicting, was sufficient to sustain the verdict for the defendant. We have no power to interfere where the judge of the lower court has re-examined the evidence on the motion for a new trial, and by his refusal to set it aside expressed himself as fully satisfied with the verdict. Judgment affirmed.

[16] Accord: Paige v. Stone, 10 Metc. (Mass.) 160, 43 Am. Dec. 420 (1845), in which it is said that to facilitate note making, and thus affect the interest and estates of third persons to an indefinite amount, is not within the object and intent of the law in regulating the common duties of the agent. Sinclair & Co. v. Goodell, 93 Ill. App. 592 (1900), quoting with approval Tiedeman on Commercial Paper, to the effect that the execution and negotiation of commercial paper by agents are so liable to the infliction of injury on the principals that the presumption of the law is more strongly opposed to an implied authority to execute commercial paper than to do anything else. Evidence that the agent had indorsed in the principal's name thirty-three checks is no proof of his authority unless the principal knows of it. Sewanee Mining Co. v. McCall, 3 Head, 619 (1859), denying the authority of an agent to accept a bill, even in an extraordinary emergency not amounting to an overruling necessity. The general manager of a business has no implied power to make or indorse negotiable paper. Connell v. McLoughlin, 28 Or. 23, 42 Pac. 218 (1895). If he has the power he may not exercise it for his own benefit, N. Y. Iron Mine v. Negaunee Bank, 39 Mich. 644 (1878); Bank v. Ohio Valley Furniture Co., 57 W. Va. 625, 50 S. E. 880, 70 L. R. A. 312 (1905); Bank of Morganton v. Hay, 143 N. C. 326, 55 S. E. 811 (1906); nor for the accommodation of a third person, Gulick v. Grover, 33 N. J. Law, 463, 97 Am. Dec. 728 (1867); Boord v. Strauss, 39 Fla. 381, 22 South. 713 (1897).

(B) Limitations

BANK OF DEER LODGE v. HOPE MINING CO.

(Supreme Court of Montana Territory, 1878. 3 Mont. 146, 35 Am. Rep. 458.)

BLAKE, J. The appellant brings this action to recover upon the following bill of exchange:

"$1,000.00 Deer Lodge, M. T., May 18th, 1874.

"At sight, pay to the order of the First National Bank, Deer Lodge, one thousand dollars. Value received, and charge the same to account of Hope Mining Co.,
by Jos. M. Alger.

"To Chas. C. Whittlesey, Prest.
"Hope Mining Co.,
"St. Louis, Mo." {Stamp.}

Indorsement: "Pay the Security Bank, or order, for collection, account of First National Bank, Deer Lodge, Montana.
"W. A. Clark, President."

The appellant has been incorporated under the laws of the United States and is engaged in a general banking business. It discounted the bill upon its date and paid the proceeds to Alger. The respondent has been incorporated under the laws of the state of Missouri and is mining some quartz lodes at Philipsburg and has an office in St. Louis, Missouri. The appellant demanded payment of the bill at the office in St. Louis, May 27, 1874, and the respondent refused to accept or pay the same. Notice of its presentment and non-payment was properly given.

The respondent denied that Alger was its agent and claimed that he had no authority to draw the bill. The court below rendered judgment for the respondent upon these grounds, and also found that it was the custom of the respondent in drawing drafts upon itself to direct them to Chas. C. Whittlesey, president of the Hope Mining Company. The only authority of Alger to draw the bill is contained in the following telegram, which was transmitted by the Western Union Telegraph Company:

"Dated St. Louis, Feb. 23d, 1874.

"Received at ———.
"To Joseph Alger, Philipsburg:
"Care for company's property. See that McArdle has what he needs. If funds needed, draw on company.
"Chas. C. Whittlesey."

This telegram was received by Alger about February 25, 1874, after the death of McArdle. One bill of exchange for $500 was drawn by Alger, March 26, 1874, which was discounted by the appellant, and afterward accepted and paid by the respondent. The proceeds were

expended for the benefit of the respondent. This bill was signed in the same manner as that involved in this action, and all parties were the same. No other bills were drawn on the respondent by Alger, but during the months of February, March and April, 1874, Alger checked against some funds of the respondent in Deer Lodge and Helena. Alger was not in the employ of the respondent when the second bill was drawn, and the proceeds were used in defraying the expenses of Mrs. McArdle and her family from Philipsburg to St. Louis. The officers of the appellant did not make any inquiries respecting the authority of Alger to sign these bills, or the purposes for which they were drawn, and never saw the telegram.

We must consider the relations of Alger and the respondent which affect the rights of the appellant. It is evident that the telegram authorized Alger to draw upon the respondent for money for certain objects. Did it constitute Alger the agent of the respondent, and empower him to sign the bill in that capacity? Did the officers of the respondent authorize those of the appellant, with whom Alger dealt, to believe as fair and reasonable men that this authority had been actually given to Alger? An examination of the law of agency will enable us to determine these questions, and if we find that either of them should be answered in the affirmative, we must decide that the respondent was bound by the acts of Alger. 1 Pars. on Notes and Bills, 100, 101, and cases there cited.

Some of the principles, which are applicable to these questions, have been announced by this court in the case of Herbert v. King, 1 Mont. 475. It was held that the principal is responsible for the acts of his agent, when they have been done within the scope of his authority, and that "courts will not tolerate any enlargement of this liability." The bill shows that Alger claimed to be the agent of the respondent, and it was the duty of the officers of the appellant to ascertain the extent of his power before they discounted it. In Mechanics' Bank v. N. Y. & N. H. R. R. Co., 13 N. Y. 631, Mr. Justice Comstock says: "Whoever proposes to deal with a security of any kind, appearing on its face to be given by one man for another, is bound to inquire whether it has been given by due authority, and if he omits that inquiry, he deals at his peril." Blum v. Robertson, 24 Cal. 140, and cases there cited. In this action, the burden of proving that Alger was the agent of the respondent in drawing the bill is on the appellant. Add. on Cont. § 57. The power of an agent to make the principal a party to negotiable paper is always restricted by the courts. "So carefully is this authority watched, that, where power is given to do some things with regard to promissory notes or bills, it cannot be enlarged by construction to do other, though somewhat similar, things." 1 Pars. on Notes and Bills, 107.

This doctrine may be illustrated by the following authorities. An agent who is authorized to draw and indorse bills of exchange in the name of his principal has no power to draw or indorse the bills in

his own name, or in the joint name of himself and his principal. Stainback v. Read, 11 Grat. 281, 62 Am. Dec. 648. The agent of a corporation who was authorized to borrow money from a bank and execute the note of the corporation therefor, could not bind his principal by borrowing the money and executing a bond for the same under the seal of the corporation. Little Rock v. State Bank, 8 Ark. 227; Story on Agency (7th Ed.) § 165. An authority to draw is not an authority to indorse or accept bills. 1 Pars. on Notes and Bills, 107, and cases there cited. In Tate v. Evans, 7 Mo. 419, the agent was authorized November 28, 1839, to draw a bill of exchange "at four months' date," and the bill was actually drawn December 23, 1839, and antedated November 28, 1839, and payable "four months after date." The court held that the bill was not in conformity to the authority conferred on the drawer and that the principal was not bound.

The authority of Alger to draw checks on the money of the respondent in this Territory is wholly distinct from that of drawing a bill of exchange on the respondent in Missouri. The power to exercise one of these acts does not include the other, and the fact that Alger checked against the funds of the respondent during the time which has been mentioned does not tend to prove that he had the authority to draw the bill in controversy.

The appellant maintains that the facts which have been referred to would authorize the officers of the appellant, as fair and reasonable men, in believing that Alger had the right to draw the bill. In other words, the argument is that the respondent is estopped from disputing that Alger had the authority he exercised respecting the bill. The officers of the appellant made no effort to ascertain the power of Alger, and appear to have assumed that the payment of the first bill by the respondent was a sufficient recognition of the authority of Alger, in drawing the second bill. If Alger had repeatedly performed acts like the one in dispute, which had been ratified by the respondent, the officers of the appellant could presume that he was authorized to draw the bill. But this conclusion could not be inferred from one instance of such recognition. The legal effect of the ratification of an unauthorized act is equivalent to the previous delegation of authority to do the act. This ratification, however, does not operate as presumptive evidence of original authority, but as a confirmation per se of the unauthorized act. Commercial Bank v. Warren, 15 N. Y. 577. In Cook v. Baldwin, 120 Mass. 317, 21 Am. Rep. 517, the court held that the part payment by the drawee of a bill of exchange is not such a recognition of his obligation as will, as matter of law, bind him to pay the remainder.

We are now brought to the consideration of the telegram from Whittlesey to Alger, and the rights of the parties to the action must depend upon its interpretation. What is the character of the instrument which Alger signed? It is a bill drawn by the agent of a cor-

poration upon itself and may be treated as an accepted bill or a promissory note, at the election of the holder. 1 Pars. on Notes and Bills, 62, 288, and cases there cited; 2 Greenl. Ev. § 160, and cases there cited. Alger had no authority to make such a bill or note; he was a special agent, and his power was accurately limited. The telegram did not describe or recognize Alger as an agent of the respondent, but authorized him to draw in his own name on the respondent, if money was needed for a particular purpose. It is not necessary for us to pursue this inquiry into the effect of the acts of Alger on the rights of all the parties to the bill. Alger violated his instructions and the respondent is not bound by his action in drawing the bill.

The purchaser of the bill should have exercised prudence and examined the telegram to see whether it justified the act of Alger. "And if, from his omission to call for or to examine the instrument, he should encounter a loss from the defective authority of the agent, it is properly attributable to his own fault, since he must know that he has no other security than his reliance upon the good faith and credit of the agent." Story on Agency (7th Ed.) § 72, and cases there cited.[17] The judgment is affirmed.

Judgment affirmed.

GOULD v. BOWEN.

(Supreme Court of Iowa, 1868. 26 Iowa, 77.)

Detinue for a promissory note, claimed by defendant under an indorsement by one Bowen as attorney in fact for plaintiff.

COLE, J. The material parts of the power of attorney under which the defendants claim the authority was given to transfer the note in controversy, are as follows: "For me and in my place and stead, to sell, convey and dispose of any and all property both personal and real, which I have or may have in Delaware county, Iowa, and give in my name any bill of sale that may be necessary, of personal property, and in my name to give a warranty deed or otherwise for any of my real estate sold, and to collect in my name any money now or hereafter to become due to me, and to do all other matters in relation to any of my property or debts which I could do, if present. Giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever, required and necessary to be done in and about the premises, as fully as I might or could do if personally present."

We hold that this language gave the attorney in fact therein named, the authority to transfer the title and possession of the note in con-

[17] The limits of the power of the agent are discussed with discrimination in the leading case of Stainback v. Read, 11 Grat. 281, 62 Am. Dec. 648 (1854), and in the recent case of Bank of Morganton v. Hay, 143 N. C. 326, 55 S. E. 811 (1906).

troversy to the defendant claiming the same. We need not decide whether the indorsement thereof would subject the principal to all the ordinary liabilities of an indorser, as that question is not necessarily involved in this case. This holding is not in conflict with the doctrine stated in 1 Pars. on Notes and Bills, 106, recognized by this court in the case of Whiting v. Western Stage Co., 20 Iowa, 554, that a general authority to transact business, even if it be expressed in words of very wide meaning, will not be held to include the power of making the principal a party to negotiable paper. For, in this case, the attorney in fact was not only empowered to dispose of all personal property and to make bills of sale thereof, but also to do all other matters in relation to the debts of the principal which she could do if present. In other words we hold, that by a fair construction of the power of attorney offered in evidence, the agent was clothed with the power to make the transfer claimed.[18]

There was no error, therefore, in admitting the evidence as offered, and the judgment of the district court is affirmed.

[18] Sometimes the power must be regarded a mere idle declaration unless the authority was meant to be conferred. Edwards v. Thomas, 66 Mo. 468 (1877). Often the circumstances are such as to justify the inference that the principal intended his general agent, managing his business, to give notes for money borrowed or goods purchased to carry on the business. Lytle v. Bank of Dothan, 121 Ala. 215, 26 South. 6 (1898). The power is presumed to be commensurate with the necessity of the situation. Whitten v. Bank of Fincastle, 100 Va. 546, 42 S. E. 309 (1902).

OTHER ILLUSTRATIONS.—The principles enunciated in the foregoing cases as to agents authorized to buy and sell, to collect and to make commercial paper might be illustrated in many other lines of employment. Authority to an agent to act in a particular business, or in particular matters in a business, is constantly implied or denied according to the usages and customs of the business, the course of dealing of the particular principal, and the reasonable necessities of the employment. But the inference must always be based upon facts, for which the principal is responsible, and not upon mere supposed convenience or propriety. Moreover, implied authority is limited to acts for the interests of the principal, and of a kind pertaining to the business upon which the agent is employed, and which are reasonably necessary to accomplish that business. These principles have been applied to agents employed:

To manage the principal's business: Gregory v. Loose, 19 Wash. 599, 54 Pac. 33 (1898), supra, p. 54; Baldwin v. Garrett, 111 Ga. 876, 36 S. E. 966 (1900); Claflin v. Continental Jersey Wks., 85 Ga. 27, 11 S. E. 721 (1890), supra, p. 337; Dearing v. Lightfoot, 16 Ala. 28 (1849); Gulick v. Grover, 33 N. J. Law, 463, 97 Am. Dec. 728 (1868); Duncan v. Hartman, 143 Pa. 595, 22 Atl. 1099, 24 Am. St. Rep. 570 (1891); Vescelius v. Martin, 11 Colo. 391, 18 Pac. 338 (1888).

To lease or rent his principal's property: Duncan v. Hartman, 143 Pa. 595, 22 Atl. 1099, 24 Am. St. Rep. 570 (1891); Babin v. Ensley, 14 App. Div. 548, 43 N. Y. Supp. 849 (1897); Fishbaugh v. Spunaugle, 118 Iowa, 337, 92 N. W. 58 (1902); Peddicord v. Berk, 74 Kan. 236, 86 Pac. 465 (1906).

To prosecute and settle claims for his principal: Scarborough v. Reynolds, 12 Ala. 252 (1847); Scales v. Mount, 93 Ala. 82, 9 South. 513 (1890); Hill v. Shoe Co., 150 Mo. 483, 51 S. W. 702; Geiger v. Bolles, 1 Thomp. & C. 129 (1873); Pollock v. Cohen, 32 Ohio St. 514 (1877); City of N. Y. v. Du Bois (C. C.) 86 Fed. 889 (1897).

To lend or borrow money: Exchange Bank v. Thrower, 118 Ga. 433, 45 S. E. 316 (1903), ante, p. 433; Bickford v. Menier, 107 N. Y. 490, 14 N. E. 438 (1887); Rider v. Kirk, 82 Mo. App. 120 (1899); N. Y. Iron Mine v. Negaunee First Nat. Bank, 39 Mich. 644 (1878); Jacobs v. Morris (1901) 1 Ch.

CHAPTER II

CONSTRUCTION OF THE AUTHORITY

BRANTLEY v. SOUTHERN LIFE INS. CO.

(Supreme Court of Alabama, 1875. 53 Ala. 554.)

Action on a note for $1,000, signed by West, Brown & Brantley. It appeared that Brantley, a farmer, had signed a surety bond for West & Burns, as agents of the Insurance Company. He had made one Berry his agent, and while he was absent from the state, Berry had signed his name to this note to settle a breach of the bond by the agents, and the surety bond had been cancelled.

BRICKELL, C. J.[1] * * * All contracts must be read in the light of surrounding circumstances. The occasion which gave rise to them, the relative position of the parties, and their obvious design as to the objects to be accomplished, must be looked at, in order to arrive at their true meaning, and to enable the court to carry out the intention of the parties. Pollard v. Maddox, 28 Ala. 325. The letter of attorney, introduced as evidence of Berry's authority to make the note on which the suit is founded, in the name of appellant, is very broad and general in its terms. Standing without explanation of the nature and character of the usual and general business of appellant, and of the circumstances under which the letter was executed, it would be impossible to limit the authority of the agent, or to give it any definite application. There is scarcely a conceivable transaction, lying within the scope of lawful delegation of authority, into which the agent could not enter, and bind the principal. The operative words of the grant of authority are, "to sign my name in the general transaction of my business, giving and granting unto my said attorney full power and authority to do and perform all and every act or thing whatever, requisite and necessary to be done in the general transaction of my business," etc. Powers of attorney

61, 70 L. J. Ch. 183, 84 L. T. Rep. (N. S.) 112, 49 Wkly. Rep. 365 (affirmed in [1902] 1 Ch. 816, 71 L. J. Ch. 363, 86 L. T. Rep. (N. S.) 275, 18 T. L. R. 384, 50 Wkly. Rep. 371); Klindt v. Higgins, 95 Iowa, 529, 64 N. W. 414 (1895); Wilson v. Campbell, 110 Mich. 580, 68 N. W. 278, 35 L. R. A. 544 (1896).

To make contracts of employment: Campbell v. Day, 90 Ill. 363 (1878) (authority of architect to employ workmen); Bush v. So. Brewing Co., 69 Miss. 200, 13 South. 856 (1891) (employ attorney); Sevier v. Birmingham, etc., Co., 92 Ala. 258, 9 South. 405 (1890), and Holmes v. McAllister, 123 Mich. 493, 82 N. W. 220, 48 L. R. A. 396 (1900) (employ medical aid). As to the authority of the agent to employ other agents, see post, p. 483 ff.

1 Part of the opinion is omitted.

are, ordinarily, subjected to a strict construction; or, rather, the authority given is not extended beyond the meaning of the terms in which it is expressed. A distinction is carefully observed, between such powers, and other powers created by deed or will, for the accomplishment of particular purposes. The purpose to be accomplished is more regarded in the latter, than in the former class of powers, and a more liberal interpretation of the words creating the powers is allowed. Story on Agency, § 67 (n. 2). In a power of attorney, words, however general, must be construed and limited in subordination to the subject matter. Thus, a general power to draw or indorse promissory notes will not authorize the drawing or indorsing of promissory notes for the mere accommodation of third persons. The authority must be confined and limited to the drawing and indorsing of promissory notes, in matters of business in which the principal has a direct and immediate interest. Wallace v. Branch Bank at Mobile, 1 Ala. 571. A physician, being about to remove from the State, left his books and accounts for professional services with a friend for settlement, giving him general authority to transact all his business in this State. The agent had not authority to assign the accounts, for the indemnity of a surety of the principal. Wood v. McCain, 7 Ala. 800, 42 Am. Dec. 612. In Scarborough v. Reynolds, 12 Ala. 252, a general authority to transact business was limited to the management and control of a plantation, and declared not to authorize the adjustment of other concerns of the principal.

The circuit court properly received evidence that the principal, at the execution of the power, had no other occupation or pursuit than that of a farmer, cultivating and renting his lands, and that it was executed in view of a contemplated temporary absence from the State. This evidence was proper, to enable the court to determine the scope of the agency, and to ascertain whether the act in question was within the power conferred. The general expressions of the power must be restrained to the principal business of the party; for it is this which is presumed to have been, and doubtless was, within his contemplation, and which he was willing to submit to the agent. A merchant, about going abroad temporarily, delegated to an agent full and entire authority to sell any of his personal property, or to buy any property for him, or on his account, or to make any contracts, and also to do any acts whatsoever, which he could, if personally present; this general language would be construed to apply only to buying or selling connected with his ordinary business as a merchant. Story on Agency, § 21. So, this power must be restrained and limited to the ordinary, general business of the principal in the cultivation and renting of his lands, and the duties and transactions it involved. It cannot fairly and properly be extended to other concerns of the principal, which cannot be presumed to have been within

his contemplation, and may have required an agent of another character and qualifications to transact.[2]

When the power was executed, the principal was surety of West and Burns, agents of appellees, on a penal bond, with condition for their faithful performance of the agency. If a breach of the bond had then occurred, and any liability rested on the principal, he was not informed of it; and of course, an adjustment of such breach, and a change of the character and form of his liability, with an extension of the time of payment to his principals, was not within his contemplation. These matters were distinct and separate from his general and ordinary business, to which his attention was directed, and in reference to which he was delegating authority: The power did not authorize the agent to adjust them, and to make the note on which the suit is founded. The circuit court erred in charging otherwise. Whether the facts disclose a recognition, and acquiescence in the act of the agent, imparting to it validity, is not a question presented for our consideration.

The judgment is reversed, and the cause remanded.

VERY v. LEVY.

(Supreme Court of the United States, 1851. 13 How. 345, 14 L. Ed. 173.)

Suit in equity to foreclose a mortgage. Answer, satisfaction of the mortgage by an agreement with one Davis, agent of complainant, to pay in goods, part of which, to the amount of $1,898.25, were delivered, and the rest of which had been constantly subject to the order of complainant. Davis had full power to trade, sell, and dispose of any notes, bills, bonds, or mortgages, held, or owned, by Very on any resident of Arkansas. The circuit court decreed the mortgage satisfied.

CURTIS, J.[3] * * * Upon this state of facts we are of opinion Davis had authority to enter into the agreement in question. Be-

[2] Accord: Porges v. U. S. Mortgage & Trust Co., 203 N. Y. 181, 96 N. E. 424 (1911).

In the case of written powers, it must appear upon a fair construction of the whole instrument that the authority in question is to be found within the four corners of the instrument, either in express terms, or by necessary implication. Bryant v. La Banque du Peuple, [1893] A. C. 170, 62 L. J. P. C. 68, 68 L. T. Rep. (N. S.) 546, 1 Reports, 336, 41 Wkly. Rep. 600; Delafield v. Illinois, 26 Wend. 192 (1841); Id., 2 Hill, 159 (1841); Doubleday v. Kress, 50 N. Y. 410, 10 Am. Rep. 502 (1872); Johnston v. Wright, 6 Cal. 373 (1856).

It will not be extended beyond what is necessary and proper to carry into full effect the authority. Golinsky v. Allison, 114 Cal. 458, 46 Pac. 295 (1896); Rhine v. Blake, 1 White & W. Civ. Cas. Ct. App. § 1066 (1881); Gouldy v. Metcalf, 75 Tex. 455, 12 S. W. 830, 16 Am. St. Rep. 912 (1889); Campbell v. Foster Home Ass'n, 163 Pa. 609, 30 Atl. 222, 26 L. R. A. 117, 43 Am. St. Rep. 818 (1894).

[3] Part of the opinion is omitted.

sides the power to collect and sell, is the power to *trade* this bond and mortgage. It might be difficult to attach any general legal signification to this word. But considered in reference to the particular facts of this case, we think its meaning sufficiently clear.

It is proved by Davis, that the power, though general in its terms, was given solely in reference to this particular bond and mortgage. The bond had yet four years to run. When, therefore, Davis was authorized to collect this bond, the parties to the letter of attorney must have had in view some agreement respecting its extinguishment, which should vary its original terms of payment; and when he was further empowered to *trade* it, it is not an inadmissible interpretation that the new agreement for its extinguishment, which he was empowered to make, might be an agreement to receive specific articles in payment. It has been said that special powers are to be construed strictly. If by this is meant, that neither the agent, nor a third person dealing with him in that character, can claim under the power any authority which they had not a right to understand its language conveyed, and that the authority is not to be extended by mere general words beyond the object in view, the position is correct. But if the words in question touch only the particular mode in which an object, admitted to be within the power, is to be effected, and they are ambiguous, and with a reasonable attention to them would bear the interpretation on which both the agent and a third person have acted, the principal is bound, although upon a more refined and critical examination the court might be of opinion that a different construction would be more correct. Le Roy v. Beard, 8 How. 451, 12 L. Ed. 1151; Loraine v. Cartwright, 3 Wash. C. C. 151, Fed. Cas. No. 8,500; De Tastett v. Crousillat, 2 Wash. C. C. 132, Fed. Cas. No. 3,828; 1 Liv. on Agency, 403, 404; Story on Agency, § 74. Such an instrument is generally to be construed, as a plain man, acquainted with the object in view, and attending reasonably to the language used, has in fact construed it. He is not bound to take the opinion of a lawyer concerning the meaning of a word not technical, and apparently employed in a popular sense. Witherington v. Herring, 5 Bing. 456.

In this case, the complainant, besides empowering Davis to collect a bond not yet payable, has authorized him to *trade* it—a word frequently used in popular language to signify an exchange of one article for another, by way of barter. This power was intended by the complainant to be acted on by the respondent, a jeweler, in the state of Arkansas, and we think he cannot complain that it was understood in its popular sense;[4] more especially when he accepted, without objection, goods amounting to $1,898.25, and gave the de-

[4] The construction should be according to the spirit rather than according to the letter of the instrument. Taylor v. Harlow, 11 Barb. 232 (1851).

fendant no notice of his dissent from that construction of the power under which his agent received them, in part payment of the bond. * * *

Decree affirmed.

HEMSTREET v. BURDICK.

(Supreme Court of Illinois, 1878. 90 Ill. 444.)

In 1856, D. B. Gardner bought certain land, giving a mortgage back. He paid little on it, and in 1859 sold to Hempstead, taking a mortgage back, and a power of attorney, authorizing him to sell, or lease, or collect rents, for these lands. The first mortgage was still outstanding, and, the interest and note being unpaid, suit was brought in 1862, which was settled by the conveyance to the mortgagees, by D. B. Gardner under his power of attorney, of the land in controversy and other land. In 1874, Hempstead and wife conveyed a tract including this land to Spencer. The bill charges that this was a fraud upon the rights of the appellee, who holds under the conveyance of 1862 and prays that Spencer's title be decreed to be held in trust for Burdick. Decree granted and defendants appeal.

WALKER, J.[5] * * * It also insisted that the power of attorney to D. B. Gardner from Hemstreet conferred no power to convey; that it authorized him to sell, lease, collect rents, etc., and that such was the construction put on it by Gardner and Hemstreet, as the former always, on making a sale, sent the deed to the latter to execute. It is immaterial what construction the parties to the instrument gave it, as it does not appear that the trustees knew of their so doing. They purchased under the advice of an attorney that Gardner had power to make the conveyance, and we presume they acted in good faith. But it is not material what the attorney in fact, or his principal, may have supposed,—the question is, whether the instrument did confer the power. This is the language of the power of attorney conferring the power to act: "To sell or lease any and all real estate belonging to me in said county of Iroquois, and to collect rents for any such property so rented or leased by him, and in and about the leasing, selling and collecting of rents, or any of them, as aforesaid, to do any and all matters and things as fully as I could do were I personally present and doing the same."

The whole question turns on the meaning that shall be given to the word "sell." Its popular meaning, we think, clearly embraces the power to contract to sell and to convey or transfer the thing sold. To complete the sale there must be a transfer of the title as well as the thing sold. When the term is applied to personal property, there

[5] Part of the opinion is omitted.

is no doubt it embraces the delivery as well as the bargain for the sale—that it in such cases means the bargain for the sale, the receipt of the purchase money and the delivery of possession, by which the sale is completed and the title vested in the purchaser. So in regard to real estate, the word "sell," in its popular sense, implies the contract and its completion by conveyance. All know that a sale of land is not complete until a conveyance is made to the purchaser—until the title has passed to and vested in him. A contract or agreement to sell does not pass the title at law, although in equity the land is considered as belonging to the buyer; but even in that forum the sale is not considered as complete, as it will compel a specific performance, and complete the sale by a conveyance of the title. We regard the word "sell," as used here, as giving ample power to complete a sale by making a deed of conveyance to the purchaser. Such is the ruling of the courts of California and Massachusetts. See Fogarty v. Sawyer, 17 Cal. 591, and Valentine v. Piper, 22 Pick. 85, 33 Am. Dec. 715. This is, then, we think, supported by reason, and also by authority.

But it is said the power must be strictly construed. This may be true, but it does not require that it shall be so construed as to defeat the intention of the parties. Where the intention fairly appears from the language employed, that intention must control. A strained construction should never be given to defeat that intention, nor to embrace in the power what was not intended by the parties.[6] According to the fair and reasonable meaning of the words, we think power to convey was conferred. * * *

Decree affirmed.

HOPWOOD v. CORBIN.

(Supreme Court of Iowa, 1884. 63 Iowa, 218, 18 N. W. 911.)

Action for the specific performance of a contract for the sale of land made by Broadstreet & Day, as agents for defendant, acting under authority of two letters from defendant's authorized agent. Relief denied.

[6] For a valuable review of the principles of construction, and of the authorities, see Muth v. Goddard, 28 Mont. 237, 72 Pac. 621, 98 Am. St. Rep. 553 (1903). The power will, if possible, be so construed as to give effect to the intent of the parties as it is found in the words of the instrument (Snell v. Weyerhauser, 71 Minn. 57, 73 N. W. 633 [1898]), and in the object to be accomplished (Posner v. Bayless, 59 Md. 56 [1882]; Holladay v. Daily, 19 Wall. 606, 22 L. Ed. 187 [1873]; Perry v. Holl, 2 De G., F. & J. 38, 29 L. J. Ch. 677 [1860]; National Bank v. Old Town Bank, 112 Fed. 726, 50 C. C. A. 443 [1902]), and so as to give effect, if possible, to all the grants of power (Vanada's Heirs v. Hopkins' Adm'r, 24 Ky. [1 J. J. Marsh.] 285, 19 Am. Dec. 92 [1829]).

REED, J.[7] * * * 2. The next question in the case is whether Broadstreet & Day were empowered by the letters to make the contract. While there is one expression in the letter of October 7th which, if considered alone, would seem to indicate an intention by defendant to reserve the right to reject or accept any offer which might be made for any portion of the land, we think, when the letters are considered together, that they confer on the agents the power to make the contract. The defendant transmitted to them the list and the prices at which he would sell the land with the first letter, and in that letter he tells them that if they can effect any sales he will be glad of it, although he reserves the right to sell through other parties, if satisfactory offers are made through them. But he answers them that if they find purchasers at the prices named in the list before the land is sold to other parties, their customers shall have it. In the second letter he tells them that "sales of the lands described can be made on the terms one-fourth to one-third cash," etc. The fair construction of all this language is, that it empowers the agents to contract for the sale of any of the land at the prices and on the terms named, subject to the right reserved by defendant to sell through other parties, if he receives satisfactory offers through them before these agents have found purchasers. And this construction has been put upon it by the agents who have contracted with plaintiff for the sale of the land in the honest belief that the power to make the contract was conferred on them by the letters.

It may be that the language is capable of the construction claimed for it by defendant, viz., that it only empowered the agents to submit the offer of plaintiff to him, and that he reserved the right to accept or reject the offer; but it is certainly open to the construction put upon it by the other parties, and the true rule of construction undoubtedly is that when the language of a writing is ambiguous it shall be taken most strongly against the contractor,[8] and especially is this true when a construction of which it is fairly susceptible has been placed upon it, and third parties have been induced to act in the belief that that construction is the correct one. Jackson v. Blodget, 16 Johns. 172; Mel-

[7] Part of the opinion is omitted.

[8] The ambiguity may often be resolved by considering the situation of the parties, as, e. g., the illiteracy of the principal and the remoteness of the business (Texas Loan Agency v. Miller, 94 Tex. 464, 61 S. W. 477 [1901]), the exigencies of the business (Muth v. Goddard, 28 Mont. 237, 72 Pac. 621, 98 Am. St. Rep. 553 [1903]), or the position of the principal (Le Roy v. Beard, 8 How. 451, 12 L. Ed. 1151 [1850]; Maynard v. Mercer, 10 Nev. 33 [1875]). It is the duty of the principal to make his terms so clear that they cannot be misconstrued. Halff v. O'Conner, 14 Tex. Civ. App. 191, 37 S. W. 238 (1896). But because the instructions are not clear the agent is not thereby authorized to disregard them entirely. Oxford Lake Line v. First Nat. Bank, 40 Fla. 349, 24 South. 480 (1898). Though he will be excused if he has bona fide adopted a permissible construction. Berry v. Haldeman, 111 Mich. 667, 70 N. W. 325 (1897).

vin v. Prop'rs, 5 Metc. 15, 38 Am. Dec. 384; Broom, Leg. Max. 571.
* * *

The judgment of the circuit court dismissing plaintiff's petition is reversed, and the cause will be remanded, with directions to enter a judgment requiring the defendant, upon the payment by plaintiff of the balance of the purchase money, with interest at 8 per cent. from October 20, 1880, within such time as the court shall direct, to execute to him a conveyance of the premises; or, if plaintiff so elects, such judgment will be entered herein.

RENWICK v. WHEELER.

(Circuit Court of the United States, D. Iowa, 1880. 48 Fed. 431.)

McCRARY, J.[9] This is a bill in equity praying the cancellation of a certain judgment appearing upon the records of the district court of Scott County, Iowa, in favor of the defendant and against the plaintiff, on the ground that the same has been settled and satisfied. The judgment was rendered on the 18th day of February, 1861, in a suit for the foreclosure of a mortgage upon certain real estate. The mortgaged property was sold under the judgment in 1861, and bought in by Wheeler, for $700, and the sheriff's deed was immediately made to him. This left a balance unsatisfied on the record which now amounts, including interest at 10 per cent., to something over $2,000. No attempt was ever made to collect this balance until December, 1878, about 17 years after the date of the judgment, when a general execution was issued, and attempts were made to enforce its payment, which led to the filing of this bill, and the allowance of a temporary injunction to restrain, until further order, the collection of the judgment.

The note and mortgage on which said judgment of foreclosure was rendered were made by complainant, James Renwick, to defendant, Wheeler, April 8, 1857, for the purchase money of a piece of land in Davenport, then purchased by Renwick from Wheeler through Wheeler's agent and attorney in fact, Erastus Ripley. Wheeler resided in Pennsylvania, and Ripley in Davenport, Iowa. Renwick, who also resided in Davenport, made certain payments on the mortgage debt, amounting in the aggregate to $565. The sum secured by the mortgage was $1,400, with interest, and the mortgage covered, besides the land purchased from Wheeler, another adjoining tract, for which Renwick had paid $600. Before the commencement of the foreclosure suit, Renwick had become financially embarrassed, and was unable to pay the balance of the debt; and he alleges in the present bill that he entered into an agreement with Wheeler, through his agent, Ripley, that Wheeler should take the entire mortgaged property in satisfaction of the balance due, and that to carry out this agreement (Renwick be-

[9] Part of the opinion is omitted.

ing unable to make a good title by deed on account of judgments against him) an amicable foreclosure was had, in which the judgment in question was rendered by default, and was left unsatisfied, after the sale, by negligence or oversight. The controversy here is (1) as to the truth of this allegation; and (2) as to its sufficiency as a matter of law to entitle the complainant to the relief sought. * * *

It is insisted on behalf of defendant that it does not appear that Ripley, the agent of Wheeler, had authority to make the contract relied upon. This depends upon the construction of the power of attorney under which Ripley acted. That instrument, which is before us, after authorizing the agent to sell, convey, or mortgage any real estate belonging to Wheeler within the state of Iowa, and to collect all sums due on that account, provides as follows: "And we do further constitute the said Erastus Ripley our general attorney in fact to transact any or all business for us, or either of us, of any kind whatsoever, in the state of Iowa; to rent houses and sign leases, and to collect money, execute receipts for the same, and to satisfy any mortgages made or to be made to us, or either of us, upon any lands in the state of Iowa; it being the true intent and meaning of this instrument to confer upon the said Erastus Ripley full and unrestricted power and authority to act for us in all matters of every kind whatsoever arising, or that may arise, in the said state of Iowa."

It is said that the general language in this power of attorney is restrained by the special and specific authority elsewhere in the same instrument conferred. The general rule is that general terms following, in the same instrument, words which confer a specific authority, are to be held subordinate to, and as limited by, the specific authority. Instruments of this character are strictly construed; and the authority is never extended beyond that which is given in terms, or which is necessary or proper for carrying the authority so given into full effect. Story, Ag. par. 68.[10] And language, however general in its form, when used in connection with a particular subject-matter, will be presumed to be used in subordination to that matter, and therefore to be

[10] Accord: Rountree v. Denson, 59 Wis. 522, 18 N. W. 518 (1884). Authority to act concerning mining operations, followed by authority to sign the principal's name to any paper of a certain sort, does not give authority to sign paper except about the mining business, and also paper of the sort specified. Washburn v. Alden, 5 Cal. 463 (1855). General power to bind the principal, in the absence of evidence of a different intent, must be construed as giving authority to bind him separately, and not conjointly with another, Harris v. Johnston, 54 Minn. 177, 55 N. W. 970, 40 Am. St. Rep. 312 (1893).

As to whether the construction of the agent's power is for court or jury, see post, p. 850; also, Claflin v. Continental Works, 85 Ga. 27, 11 S. E. 721 (1890), ante, p. 337; and Booth v. Kessler, 62 Neb. 704, 87 N. W. 532 (1901); post, p. 848.

While the existence of an agency is a question of fact, what may lawfully be done thereunder is a question of law. Long Creek Building Ass'n v. State Ins. Co., 29 Or. 569, 46 Pac. 366 (1896); Halladay v. Underwood, 90 Ill. App. 130 (1899); Berry v. Haldeman, 111 Mich. 667, 70 N. W. 325 (1897); Loudon Sav. Fund Society v. Hagerstown Sav. Bank, 36 Pa. 498 (1897); 78 Am. Dec. 390 (1860). As to evidence of agency, see p. 820.

construed and limited accordingly. Id. par. 62. Applying these rules to the power of attorney under consideration, it appears that the particular subject-matter was the business of Wheeler in the state of Iowa, relating to his real estate, including selling, mortgaging, leasing, collecting moneys due for rents or as purchase money, and including the satisfaction of mortgages. With respect to all business of this general nature within the state of Iowa, Ripley, as Wheeler's agent, had "unrestricted power and authority," and was to act as his "general attorney in fact." The settlement in question was a transaction relating to the particular subject-matter of the agency; and therefore the agent had discretionary power to accept the mortgaged premises in full for the debt. * * *

Decree for complainant.

CHAPTER III

EXECUTION OF THE AUTHORITY

SECTION 1.—IN GENERAL

WILKS v. BACK.

(Court of King's Bench, 1802. 2 East, 142, 6 R. R. 409.)

Motion to set aside an award of arbitration. The bond of submission to arbitration had been signed: "Mathias Wilks. [L. S.] For James Browne, Mathias Wilks. [L. S.]"—and was sealed and delivered by Wilks for himself and also for his late partner, Browne.

LAWRENCE, J. No doubt in point of law, the act done must be the act of the principal, and not of the attorney who is authorized to do it. The whole argument has turned upon an assumption of fact that this was the act of the attorney, which is not well founded. This is not like the case in Lord Raymond's Reports, where the attorney had demised to the defendant in her own name, which she could not do; for no estate could pass from her, but only from her principal. But here the bond was executed by Wilks for and in the name of his principal: and this is distinctly shewn by the manner of making the signature. Not that even this was necessary to be shewn; for if Wilks had sealed and delivered it in the name of Browne, that would have been enough without stating that he had so done. However, he first signs his own name alone opposite to one seal to denote the sealing and delivery on his own account, and then opposite the other seal he denotes that the sealing and delivery was for James Browne. There is no particular form of words required to be used, provided the act be done in the name of the principal.

LE BLANC, J. Wilks first signed it in his own name, as for himself, and then to denote that the act was also done in the name of Browne, he signed it again for James Browne. I cannot see what difference it can make as to the order in which the names stand.

Rule discharged.

POST v. PEARSON.

(Supreme Court of the United States, 1882. 108 U. S. 418, 2 Sup. Ct. 799, 27 L. Ed. 774.)

Action against Whitney and Post, as partners under the name of the Keets Mining Company, on a contract made by Whitney as superintendent of the company, and signed: "A. W. Whitney, [Seal.] Supt. Keets Mining Co. [Seal.] John B. Pearson. [Seal.]." Oral evidence was allowed to show that Post was a partner of Whitney, and Post brings error.

GRAY, J. It is unnecessary to consider whether, if this were to be treated as a contract under seal, it could be held to be upon its face the contract of the Keets Mining Company, and not of Whitney only, or whether the oral testimony would have been admissible to charge Post; because, by the Civil Code of Dakota, "all distinctions between sealed and unsealed instruments are abolished," and "any instrument within the scope of his authority, by which an agent intends to bind his principal, does bind him, if such intent is plainly inferable from the instrument itself." Civ. Code Dak. 1877, §§ 925, 1373.[1]

By the subject-matter of this contract, which is the delivery and milling of ore from the Keets mine; by the description of Whitney, both in the body of the contract and in the signature, as superintendent of the Keets Mining Company; and by the use of the words "parties of the first part," which are applicable to a company and not to a single individual, the contract made by the hand of Whitney clearly appears upon its face to have been intended to bind, and therefore did bind, the company; and, upon proof that Post was a partner in the company, bound him. Whitney v. Wyman, 101 U. S. 392, 25 L. Ed. 1050; Hitchcock v. Buchanan, 105 U. S. 416, 26 L. Ed. 1078; Goodenough v. Thayer, 132 Mass. 152.

The order sustaining Post's demurrer to the original complaint gave the plaintiff leave to amend, and did not preclude the plaintiff from renewing, nor the court from entertaining, the same question of law upon a fuller development of the facts at the trial on the amended complaint. Calder v. Haynes, 7 Allen, 387.

Judgment affirmed.

[1] The strict rule as to the execution of instruments under seal no longer applies in some states where distinctions as to seals are abolished by statute. Wheeler v. Walden, 17 Neb. 122, 22 N. W. 346 (1885). Though some courts hold that statutes dispensing with the necessity of seals have not changed the common-law rule as to deeds executed by agents. Jones v. Morris, 61 Ala. 518 (1878).

WILSON v. BEARDSLEY.

(Supreme Court of Nebraska, 1886. 20 Neb. 449, 30 N. W. 529.)

MAXWELL, C. J. The facts in the above case are substantially as follows: Wilson & Larison, the plaintiffs in error, were, at the time referred to herein, and are now, importers and jobbers of tea, cigars, and spices, having their principal place of business at Omaha, Nebraska. During the times aforesaid they had in their employ a traveling salesman named A. P. Nichols. Under their contract of hire with him they were to pay him a salary of $75 per month, and commissions upon all sales, and he was to pay his own expenses. On the fifth of January, 1883, Wilson & Larison wrote a letter to Nichols, at Ogden, Utah, telling him, among other things, that he might draw on them for $75. This letter Nichols received, and altered by prefixing the figure "1" to "75," so that it read $175. The change was skillfully made, and well calculated to deceive.

The testimony shows that Nichols, at this time, was a guest of defendant in error; that Nichols desired to draw on plaintiffs in error for $150; that it was made to appear that an indorser to the draft about to be drawn was necessary; that defendant in error was requested by Nichols to indorse said draft, and, as an inducement to do so, exhibited to him and the bank cashier the letter of plaintiffs in error, altered as aforesaid, apparently authorizing him to draw on them for $175; that on the faith and credit of that letter defendant in error did indorse said draft; that in due course of business said draft was presented to plaintiffs in error at Omaha for payment, and payment by them was refused on the ground of "no funds"; that said draft was thereupon duly protested, and returned unpaid to the bank at Ogden, where defendant in error was required to pay, and did pay, the full amount of the draft, with protest fees, amounting in all to $152.25.

On the trial of the cause in the court below judgment was rendered for $75 in favor of Beardsley, from which the plaintiffs herein bring the cause into this court by petition in error.

No case has been cited exactly in point by either party, and we are compelled to adopt such a rule as will, as far as possible, do justice between the parties. The rule is well settled that a principal will be bound by the acts of his agent within the scope of his apparent authority. St. Louis & M. P. Co. v. Parker, 59 Ill. 23; Fatman v. Leet, 41 Ind. 133; Kerslake v. Schoomaker, 3 Thomp. & C. 524; Tucker v. Woolsey, 64 Barb. 142; Philadelphia, etc., R. Co. v. Weaver, 34 Md. 431; Bronson v. Chappell, 12 Wall. 681, 20 L. Ed. 436; Golding v. Merchant, 43 Ala. 705. The plaintiffs must have intended that their letter, above referred to, should be used as a letter of credit to enable Nichols to obtain the $75 upon the draft which he was authorized to draw on them. To this extent he was acting within the scope of his authority, and his acts were valid. The draft, therefore, was unau-

thorized only as to the excess over $75. Nichols was the plaintiffs' agent, and so held out by them, to some extent at least, as being trustworthy. This fact, while it would not make them liable for any material alteration in the letter made by such salesman, is yet a circumstance tending to show that he had some claim upon them, and thereby, no doubt, led to less careful inquiry in regard to the extent of the agent's authority than otherwise would have been had. The letter was in the nature of a power of attorney, by which the principals agreed to ratify the act of the agent to a certain extent, authorizing him to draw in his own name upon them for a certain amount.[2] Now, suppose that the agent had changed this so as to show authority in him to draw two drafts on the plaintiffs, each for $75, could they plead, as a defense to the first draft, that it was unauthorized, and that, therefore, an innocent indorser, relying upon their letter, should be defrauded? We think not. The authority would be wanting only as to the second draft. The same rule is applicable here; there being an actual authority to draw to the extent of $75.

The judgment of the court below is clearly right, and is affirmed.

SECTION 2.—SEALED INSTRUMENTS

CLARKE'S LESSEE v. COURTNEY.

(Supreme Court of the United States, 1831. 5 Pet. 319, 8 L. Ed. 140.)

Ejectment against a large number of persons in possession of a large tract of land in Kentucky. Plaintiff claimed under demise from James B. Clarke, and some of the defendants on a deed of relinquishment by Carey L. Clarke, as attorney in fact of James B. Clarke and wife.

STORY, J.[3] [After holding that the power of attorney gave no authority to make such a release:] * * * But if this objection were not insuperable, there is another, which, though apparently of a technical nature, is fatal to the relinquishment. It is, that the deed is not executed in the names of Clarke and his wife, but by the attorney, in his own name. It is not, then, the deed of the principals, but the deed of the attorney. The language is, "I, the said Carey L. Clarke,

[2] An act done under an authority must be done in pursuance of that authority. Clinan v. Cooke, 1 Sch. v. Lef. 32, 9 Rev. Rep. 3 (1802). If an agent filling up a blank note exceeds his authority, the note is not void in toto, but only for the excess amount. Johnson v. Blasdale, 9 Miss. (1 Smedes & M.) 17, 40 Am. Dec. 85 (1843). If the contract is separable, it will be upheld to the extent of the authority. Gano v. C. & N. W. Ry. Co., 49 Wis. 57, 5 N. W. 45 (1880). But if there is no way to determine what is authorized, and what is not, the whole execution is defective. Choteau v. Allen, 70 Mo. 290 (1879).

[3] Part of the opinion is omitted.

attorney as aforesaid," &c. "do hereby relinquish," &c.; and the attesting clause is, "In witness whereof the said Carey L. Clarke, attorney as aforesaid, has hereunto subscribed his hand and seal, this 25th day of November, in the year of our Lord 1800. Carey L. Clarke, [L. S.]"

The act does not therefore purport to be the act of the principals, but of the attorney. It is his deed, and his seal, and not theirs. This may savour of refinement, since it is apparent that the party intended to pass the interest and title of his principals. But the law looks not to the intent alone, but to the fact whether that intent has been executed in such a manner as to possess a legal validity.[4]

The leading case on this subject is Combe's Case, 9 Co. R. 75, ante, p. 35, where authority was given by a copy holder to two persons as his attorneys, to surrender ten acres of pasture to the use of J. N.; and afterwards, at a manor court they surrendered the same, and the entry on the court roll was, that the said attorneys in the same court showed the writing aforesaid, bearing date, &c. and they, by virtue of the authority to them by the said letter of attorney given, in full court, surrendered into the hands of the said lord the said ten acres of pasture, to the use of the said J. N. &c.; and the question was whether the surrender was good or not, and the court held it was good. "And it was resolved, that when any has authority as attorney to do any act, he ought to do it in his name who gives the authority, for he appoints the attorney to be in his place, and to represent his person; and therefore the attorney cannot do it in his own name, nor as his proper act, but in the name and as the act of him who gives the authority. And where it was objected that in the case at bar the attorneys have made the surrender in their own name, for the entry is that they surrendered, it was answered and resolved by the whole court, that they have well performed their authority; for, first, they showed their letter of attorney, and then they by the authority to them by the letter of attorney given, surrendered, &c. which is as much as to say, as if they had said, we, as attorneys, &c. surrender, &c. and both these ways are sufficient. As he who has a letter of attorney to deliver seisin saith, I, as attorney to J. S. deliver you seisin; or, I, by force of this letter of attorney, deliver you seisin. And all that is well done, and a good pursuance of his authority. But if attorneys have power by writing to make leases by indenture for years, &c. they cannot make indentures in their own names, but in the name of him who gives the warrant."

Such is the language of the report, and it has been quoted at large, because it has been much commented on at the bar; and it points out

[4] An interesting review of the early cases is given in Townsend v. Corning, 23 Wend. 435 (1840). While courts will interpret the words in a deed so as to effectuate the intent of the parties appearing from the whole instrument, yet the words must be there to interpret. The court cannot supply these, nor may they be supplied by evidence aliunde. Cadell v. Allen, 99 N. C. 542, 6 S. E. 399 (1888). That it is absurd to give a seal the effect of changing the parties liable on a contract was pointed out in Eckhart v. Reidel, 16 Tex. 62 (1856).

a clear distinction between acts done in pais, and solemn instruments or deeds, as to the mode of their execution by an attorney. It has been supposed that the doctrine of Lord Holt in Parker v. Kett, 1 Salk. 95, and better reported in 2 Mod. R. 466, intimated a different opinion. But correctly considered it is not so. Lord Holt expressly admits (468), that the doctrine in Coombe's Case, that he who acts under another ought to act in his name, is good law beyond dispute: and the case there was distinguishable; for it was the case of a subdeputy steward, appointed to receive a surrender, which was an act in pais. However this may be, it is certain that Coombe's Case has never been departed from, and has often been acted upon as good law. In Frontin v. Small, 2 Ld. Raym. 1418, where a lease was made between M. F. "attorney of J. F." of the one part, and the defendant of the other part, of certain premises for seven years, in a suit for rent by M. F., it was held that the lease was void for the very reason assigned in Coombe's Case. Lord Chief Baron Gilbert (4 Bac. Abridg. Leases and Terms for years, I, 10, 140) has expounded the reasons of the doctrine with great clearness and force; and it was fully recognized in White v. Cuyler, 6 T. Rep. 176, and Wilks v. Back, 2 East. 142. If it were necessary it might easily be traced back to an earlier period than Coombe's Case. 4 Bac. Abridge. Leases and Terms for years, I, 10, 140, 141; Com. Dig. Attorney, C, 14; Moore, 70. In America, it has been repeatedly the subject of adjudication, and has received a judicial sanction. The cases of Bogart v. De Bussy, 6 Johns. 94, Fowler v. Shearer, 7 Mass. 14, and Elwell v. Shaw, 16 Mass. 42, 8 Am. Dec. 126, are directly in point.

It appears to us, then, upon the grounds of these authorities, that the deed of relinquishment to the state was inoperative; and consequently the court erred in refusing the instruction prayed by the plaintiff, that it did not bind him; and in directing the jury, that if the execution of it was proved, it was a bar to the recovery of the land described therein. * * * Reversed.

SECTION 3.—SIMPLE CONTRACTS

WILEY v. SHANK.

(Supreme Court of Indiana, 1837. 4 Blackf. 420.)

A contract by which two persons by name, describing themselves as trustees of a certain school district, agree that the "trustees" shall pay a teacher a certain sum for his services, and which is executed by those persons in their own names, is binding upon them individually.

In a justice's court, an article of agreement between the parties, containing conditions precedent to be performed by the plaintiff, may be filed as the cause of action, without an averment of performance of the conditions.

FRAMBACH v. FRANK.

(Supreme Court of Colorado, 1905. 33 Colo. 529, 81 Pac. 247.)

Action on a contract signed by the agent, Frambach, by which he, acting for himself and for the Cripple Creek Beam Milling Company, agrees to certain terms about the purchase of a mill, and, in case of purchase, to the issue to Frank of a one-fourth interest in the mill. Frambach purchased the mill for the company, and on this action by Frank judgment was rendered for plaintiff for $13,000.

GODDARD, J. We think it satisfactorily appears from the evidence that the appellant was the authorized agent of the company, and acted as such agent in the purchase of the mill. The question to be determined, therefore, is whether this agreement, by its terms, imposes a personal obligation upon the appellant to pay the amount agreed to be paid the appellee, notwithstanding the property was so purchased. In other words, does the language used in the agreement, when construed in the light of the surrounding circumstances, ex vi termini, bind the appellant, or does it obligate the company only to pay to the appellee the consideration mentioned?

It is well settled that an agent may bind his principal by a written contract not under seal without executing the same in the name of the principal, if, from the whole instrument, it may be gathered that he either acts as agent or intends to bind his principal. In such case, although he executes the instrument in his own name he will not be personally bound unless the language shows a clear intent to the contrary; and the presumption is that an apparent agent intends to bind his principal, and not himself. In Story on Agency (9th Ed.) § 160a, the rule in respect to written contracts not under seal is stated as follows: "It is very clear from the authorities that it is not indispensable, in order to bind the principal, that such a contract should be executed in the name and as the act of the principal. It will be sufficient if, upon the whole instrument, it can be gathered from the terms thereof that the party describes himself and acts as agent, and intends thereby to bind the principal, and not to bind himself." In general when a person acts and contracts avowedly as the agent of another, who is known as the principal, his acts and contracts, within the scope of his authority, are considered the acts and contracts of the principal and involve no personal liability on the part of the agent. 1 Am. & Eng. Enc. Law (2d Ed.) 1119; Whitney v. Wyman, 101 U. S. 392, 25 L. Ed. 1050; Smith v. Alexander, 31 Mo. 193; Rathbon v. Budlong, 15 Johns. 1; Hall v. Huntoon, 17 Vt. 244, 44 Am. Dec.

332; 3 Clark & Marshall on Corps. p. 1860, § 615a; Magill v. Hinsdale, 6 Conn. 465, 16 Am. Dec. 70.[5]

It appears from the face of the agreement under consideration that it was contemplated and understood by the appellant and appellee that the former might act in one of two capacities in purchasing the mill—personally in his own behalf, or as agent of the Cripple Creek Beam Milling Company—and only in the event he should act in the representative capacity was the appellee entitled to the compensation sued for. Eliminating that part of the agreement which refers to the obligations of the appellant in the event that he should elect to purchase the mill for himself, there remains a complete agreement in which there is a full disclosure of the name of his principal, and the fact that appellant was acting as the agent of such principal, thus showing the capacity in which the promise was made, and who was intended to be bound thereby.

We think, therefore, that, when tested by the foregoing rule, the agreement clearly evidences the obligation of the company, and exonerates the appellant from any personal liability thereunder, and the court below erred in rendering judgment against him. In this view of the instrument, it becomes unnecessary to notice the objection urged against its validity, as the judgment must be reversed for the reasons given.

Reversed.

CITY OF DETROIT v. JACKSON.

(Supreme Court of Michigan, 1843. 1 Doug. 106.)

Error on certiorari from Wayne circuit court. Upon an agreement for a submission to arbitration a judgment upon the award for $2,204 had been entered against the city. Among other errors it was assigned that the submission to arbitration was not duly executed by the city.

FELCH, J.[6] * * * 2. It is contended that, admitting the authority of Zina Pitcher to enter into the submission on behalf of the plaintiffs in error, he has not so executed the agreement for submission, as to bind his principals. "The mayor, recorder, aldermen and freemen of the city of Detroit, by Zina Pitcher, mayor of said city,

[5] When the agent signs in the name of his principal, the latter only is liable on the contract. To admit parol evidence to show it was intended to be the agent's contract would be to contradict the writing, which is not allowable Heffron v. Pollard, 73 Tex. 96, 11 S. W. 165, 15 Am. St. Rep. 764 (1889).

Unless there are in the contract apt words to bind the agent, he will not be liable on the contract, Jenkins v. Hutchinson, 13 Q. B. 744, 66 E. C. L. 743 (1849); Ogden v. Raymond, 22 Conn. 379, 58 Am. Dec. 429 (1853); Johnson v. Welch, 42 W. Va. 18, 24 S. E. 585 (1896); the more so if he be a public agent whose authority is publicly known, McCurdy v. Rogers, 21 Wis. 197, 91 Am. Dec. 468 (1866).

[6] Part of the opinion is omitted.

and agent for that purpose duly appointed," is the description of the contracting party in the body of the agreement; and the justice's certificate of its acknowledgment describes the party appearing before him in precisely the same words. But the agreement is signed "Zina Pitcher, Mayor of Detroit," without any other addition; and it is contended that a disclosure of the agency should have been made by an addition to the signature, as well as by description in the body of the instrument.

It is perfectly competent for an agent, who has due authority to contract on behalf of his principal, so to execute an instrument, as to make himself personally responsible for his principal. Thus, in Stone v. Wood, 7 Cow. 453, 17 Am. Dec. 529, the defendant described himself in the charter party on which the suit was brought, as agent for J. & R. Raymond, but in fact agreed for himself, his executors and administrators, to pay the freight therein mentioned, and was held to be bound personally. In Spencer v. Field, 10 Wend. 87, the contract was made between the defendant and "James Hillhouse, commissioner of the school fund for the state of Connecticut, for and in behalf of said state," was under seal, and was signed "James Hillhouse, Commissioner of the School Fund." It was held that it was not the contract of the state. In Pentz v. Stanton, 10 Wend. 271, 25 Am. Dec. 558, the plaintiff declared on a bill of exchange, drawn by, and signed "H. T. West, Agent." The suit was against the principal, who was held not to be bound, his name not appearing on the bill. Taft v. Brewster and others, was upon a bond, in which the defendants, by the name and description of "Jacob Brewster, Thaddeus Loomis and Joseph Coats, trustees of the Baptist Society of the town of Richfield, acknowledged themselves to be held and firmly bound," &c. The same description was added to their signatures. It was held to be their individual bond, and not that of the Baptist Society. See, also, White v. Skinner, 13 Johns. 307, 7 Am. Dec. 381; Tippets v. Walker, 4 Mass. 595.

In these and numerous other cases of the same class, the Court have simply looked to the form of the instrument itself, in order to ascertain whether it is the contract of the principal, or of the agent personally. If, by the terms of the agreement, a party describing himself as agent, undertakes to do certain things, the mere addition of the word agent, or indeed any other designation which he may add to his name, will not make it the contract of his principal. Such addition will be regarded as mere description; and will not have the effect of binding a third person, who is not, in form, made a party to the instrument. It is not enough that the person executing an instrument have power as agent to bind a third person; he must, in fact, make it the obligation of that person in terms, in order to bind him.

But in determining whether an instrument, executed by an agent, contains the obligation of the principal, we are to look to the whole

instrument.[7] The particular form of execution is not material, if it be substantially done in the name of the principal. Magill v. Hinsdale, 6 Conn. 464, 16 Am. Dec. 70; Pentz v. Stanton, 10 Wend. 275, 25 Am. Dec. 558. In this case, the plaintiffs in error are fully described in the body of the agreement for submission, as the contracting party. The submission is directly asserted to be theirs; the name of the agent is given, as the instrument, through whom the act is done. The agent does not purport to act for, or in any manner to bind himself, personally. On the contrary, the body of the instrument fully shows, that he is the mere agent, and that the submission is the submission of the plaintiffs in error. It is in the precise form given in Spencer v. Field, 10 Wend. 87, as the proper form of drawing an instrument, to be executed by an agent, so as to bind his principal. It is signed "Zina Pitcher, Mayor of Detroit." Were there nothing in the body of the instrument, which clearly showed who was the contracting party, it would not certainly bind the plaintiffs in error. But here, the capacity in which Pitcher acted, is fully explained. No part of the instrument shows that he makes any contract individually; but the whole of it shows that he acts as the agent for the plaintiffs in error, and to have added or prefixed their name to his signature, would have been but to repeat, in the same instrument, what already sufficiently appeared.

It is true there are cases which appear to establish the doctrine, that the name of the principal must be signed to an instrument executed by an agent. But in the case of New England Marine Insurance Co. v. De Wolf, 8 Pick. 56, Parker, C. J., in delivering the opinion of the Court, remarks, that "the authorities cited to maintain this position, are of deeds only; instruments under seal." No doubt this is the rule in regard to sealed instruments. Not only must the principal's name be signed to them, but his seal must be affixed also. White v. Cuyler, 6 T. R. 176; Wilkes v. Back, 2 East, 142; Simonds v. Catlin, 2 Caines, 66; Elwell v. Shaw, 16 Mass. 42, 8 Am. Dec. 126; Combe's Case, 9 Co. 76b; Frontin v. Small, 2 Ld. Raym. 1418; Fowler v. Shearer, 7 Mass. 14; Stinchfield v. Little, 1 Greenl. 231,

[7] The rigid rule as to deeds should not be extended to mercantile transactions. New England Marine Ins. Co. v. De Wolf, 8 Pick. 56 (1829). In the case of instruments not under seal the courts will look to the instrument to learn what the intention is. Andrews v. Estes, 11 Me. 267, 26 Am. Dec. 521 (1834). This has been well expressed in Whitney v. Wyman, 101 U. S. 392, 395, 25 L. Ed. 1050 (1879), approved in Sun Printing & Publishing Ass'n v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366 (1902): "The question is always one of intent; and the court being untrammeled by any other consideration is bound to give it effect. As the meaning of the law-maker is the law, so the meaning of the contracting parties is the agreement. Words are merely the symbols they employ to manifest their purpose that it may be carried into execution. If the contract be unsealed and the meaning clear, it matters not how it is phrased nor how it is signed, whether by the agent for the principal, or with the name of the principal by the agent, or otherwise. The intent developed is alone material, and when that is ascertained it is conclusive."

10 Am. Dec. 65. Where, however, the instrument is not under seal, a different rule prevails. In such cases, it is enough if the contract is made in the name of the principal, and as his contract, through the agent, and the signature of the agent is made to the instrument purporting to charge his principal. In New England Marine Insurance Co. v. De Wolf, before cited, the declaration was upon a guaranty endorsed on the back of a note, given for a premium on insurance, as follows: "By authority of J. De Wolf, Junior, in a letter dated September 24, 1824, I hereby guaranty his payment of the premium or policy No. 10,079. Isaac Clap." It was held that the defendant was bound as guarantor of the notes; Clap, the agent, having authority to sign for his principal, and his intention to do so, being evident from the warranty itself.

A familiar instance of the manner of executing a contract by an agent, is found in the case of bank bills. They are, upon their face, the promises of the corporation by which they were issued; but they are signed by the president and cashier, with an abbreviation showing only the capacity in which they sign. It has never been contended, that, because these agents did not add to their signatures the name of the corporation, they were personally bound, and not the corporation. Even where a check was drawn by the cashier of a bank, and it appeared doubtful whether it was an official or a private act, parol evidence has been admitted to show that it was an official act, for the purpose of making the bank responsible. Mechanics' Bank v. Bank of Columbia, 5 Wheat. 326, 5 L. Ed. 100; Story on Agency, 268, note.

We entertain no doubt as to what is the proper construction of the agreement for submission in this case. We think the plaintiffs in error must be regarded as one of the contracting parties, although their agent has signed his own name to it, without adding the name of his principals. * * *

SECTION 4.—NEGOTIABLE INSTRUMENTS

MERCHANTS' BANK OF MACON v. CENTRAL BANK OF GEORGIA.

(Supreme Court of Georgia, 1846. 1 Ga. 418, 44 Am. Dec. 665.)

Action upon a bill of exchange, which requested the Fulton Bank of New York to pay Scott Cray, agent, or order, $5,000. The bill was endorsed by "Scott Cray, Agent," and was protested in New York, and notice of protest was given. The principal was not disclosed, but was afterwards shown to be the plaintiff in error, defend-

ant below. On the trial the agency of Scott Cray was proven by the books of the bank. Error was alleged upon various grounds, chiefly because the bill did not bind the bank, as its name nowhere appeared upon the instrument.

NISBET, J.[8] There are two counts in the plaintiff's writ: One founded on the bill of exchange, the other for money had and received. The testimony proves that the bill was discounted by the Central Bank, at the instance of Scott Cray, for the Bank of Hawkinsville; that the money was paid to him, and deposited in the agency of the Hawkinsville Bank at Macon, to the credit of Jerry Cowles, the drawer; and that two-thirds of it was applied in extinguishment of a debt due by him to the Hawkinsville Bank; the balance, Mr. Cowles was permitted to check out. Under this state of facts, if it is conceded that the Merchants' Bank of Macon is not liable to pay this bill, upon the endorsement of Scott Cray, yet it is, in our opinion, liable upon the common count, upon principles ex æquo et bono.

If a person, assuming to act as the agent of a corporation, but without legal authority, makes a contract, and the corporation receive the benefit of it, and use the property acquired under it, such acts will ratify the contract, and render the corporation liable thereon. Angell and Ames (2d Ed.) 178; Utica Ins. Co. v. Kip, 8 Cow. 25; Story on Agency, § 162; Episcopal Charitable Society v. Episcopal Church in Dedham, 1 Pick. 372; Bank of Columbia v. Patterson, 7 Cranch, 299, 3 L. Ed. 351; Randall v. Van Vechten, 19 Johns. 60, 10 Am. Dec. 193; Utica Ins. Co. v. Bloodgood, 4 Wend. 654; Mechanics' Bank v. Bank of Columbia, 5 Wheat. 334, 5 L. Ed. 100. It is contended by the plaintiff in error, that an act of an agent, to be binding upon his principal, must be done in the name of the principal; and, inasmuch as the name of the principal does nowhere appear on this bill, it cannot be evidence to charge the principal, the Merchants' Bank of Macon, formerly the Bank of Hawkinsville. The bill is payable to the order of Scott Cray, agent; drawn by J. Cowles, upon the cashier of the Fulton Bank, New York; acceptance waived, and endorsed "Scott Cray, Agent."

The inference drawn from the paper is, that Scott Cray acted as agent for some person, or corporation, but who, or what, does not appear. The name of his principal does not appear. The general rule is this: in order to bind a principal, on a contract made by an agent, it must purport, on its face, to be the contract of the principal; and his name must be inserted in it, and signed to it. It is not enough that the agent be described as such in the instrument. Story on Agency, § 147; Paley on Agency, by Lloyd, 180, 181, 182; 2 Kent, 629, 3d edition.

[8] Part of the opinion is omitted.

This rule applies, more particularly, to solemn instruments under seal; and as to them, to use the language of Judge Story, it is "regularly true," but not universally true in all its extent. For, so far as regards instruments under seal, there are some exceptions to some of the requirements of the rule. Although the rule is thus strict as to sealed instruments, yet a more liberal rule obtains as to unsolemn instruments, especially commercial and maritime contracts. In such cases, in furtherance of the public policy of encouraging trade, if it can, upon the whole instrument, be collected, that the true object and intent of it are, to bind the principal, and not merely the agent, courts of justice will adopt that construction of it, however informally it may be expressed. Story on Agency, § 154. This is a commercial contract, not under seal, and comes under the rule last laid down. If an agent, in a parol contract, intends to bind his principal, and appears to act as agent, the principal is bound. Wheaton's Selwyn, 823, note 5, Am. Ed.; Andrews v. Estes, 2 Fairf. (11 Me.) 267, 26 Am. Dec. 521; New England Ins. Co. v. De Wolf, 8 Pick. 56; Angell and Ames, 235–237.

It may be stated generally, that where it appears from the face of the paper, that the credit is not given to the agent, and the name of principal is disclosed at the time of the transaction, and the act is within the powers of the agent, the principal is bound. The question whether the agent is bound, does not affect this question, for there are many cases where both principal and agent are bound. Now, it is apparent on this bill of exchange, that it was the intent of the parties to bind Scott Cray's principal: else why make it payable to him as agent, and why take his endorsement as agent? It is still more manifest that he does appear to act as agent. The testimony upon the trial, too, is, that the name of his principal was disclosed to the Central Bank at the time the bill was discounted. We hold, too, that upon parol contract, where the intent is not sufficiently clear that the principal is to be bound, the defect can be supplied by parol testimony. A party cannot be discharged, who is apparently liable on the contract, but a new party may be introduced by parol. Ang. and Ames, 236, 237; Mechanics' Bank v. Bank of Columbia, 5 Wheat. 326, 5 L. Ed. 100; Mott v. Hicks, 1 Cow. 536, 13 Am. Dec. 550; Emerson v. Providence Hat Mfg. Co., 12 Mass. 240, 7 Am. Dec. 66; Hodgson v. Dexter, 1 Cranch, 345, 2 L. Ed. 130; 6 Adolphus & Ellis, 486; 8 Meeson & Welsby (Excheq.) 440. See, also, Story on Agency, 190, 191, 334–336.[9]

The testimony on the trial shows that it was the intent of the parties to bind the Bank of Hawkinsville by this endorsement. * * * Affirmed.

[9] A discriminating review of the cases is given in Forsyth v. Day, 41 Me. 382 (1856), ante, p. 76, and a still more extensive one may be found in Shuey v. Adair, 18 Wash. 188, 51 Pac. 388, 39 L. R. A. 473, 63 Am. St. Rep. 879 (1897).

PRATT v. BEAUPRE.

(Supreme Court of Minnesota, 1868. 13 Minn. 187 [Gil. 177].)

McMILLAN, J. This action is brought by the plaintiff to recover damages for an alleged breach of a contract to transport and deliver certain flour. The contract is in the following words:

"St. Paul, May 6, 1863.

"We, Temple & Beaupre, of St. Paul, Ramsey county, Minnesota, for the consideration of $25 to us in hand paid, the receipt whereof is hereby acknowledged, have bargained, agreed, and contracted with B. F. Pratt, of St. Peter, to receive at his mill in St. Peter, county of Nicollet, state aforesaid, one thousand and four hundred barrels (1,400) of flour, and transport the same and deliver to Capt. M. P. Small, commissary of subsistence for the United States, on the levee in St. Paul, at such time as he, the said Small, shall direct, for the sum of 25 cents for each barrel so transported and delivered in good order. [Signed] Temple & Beaupre,

"Agents Steamer Flora.

"B. F. Pratt."

The words, "agents steamer Flora," attached to the signature of Temple & Beaupre, are descriptio personarum. The rule is, that when words which may be either descriptive of the person, or indicative of the character in which a person contracts, are affixed to the name of a contracting party, prima facie they are descriptive of the person only;[10] but the fact that they were not intended by the parties as descriptive of the person, but were understood as determining the character in which the party contracted may be shown by extrinsic evidence, but the burden of proof rests upon the party seeking to change the prima facie character of the contract. And when a

[10] A signature, "D. H., Agent for the Churchman," has been held to indicate, probably, merely a memorandum to show from what fund the note so signed should be paid, and to bind the agent personally to pay the note. De Witt v. Walton, 9 N. Y. 571, Seld. Notes, 253 (1854). See extended discussion in Knippenberg v. Greenwood Mining Co., 39 Mont. 11, 101 Pac. 159 (1909).

That it is unreasonable to treat the words "agent," "president," "superintendent," "manager," as mere descriptive persons has often been suggested. Whatever may be the custom in England, in the United States men in signing business instruments are not wont thus to designate their rank or calling, and when such terms are used it is highly artificial, and rarely, if ever, in accord with the facts, to regard them as descriptive of the person. They are always intended as descriptive of the capacity in which he acts, and if on the paper anything appears to show who this principal is it seems absurd not to give effect to this evident intent. See the extended discussion in Second Nat. Bank v. Midland Steel Co., 155 Ind. 581, 58 N. E. 833, 52 L. R. A. 307 (1900); Sayre v. Nichols, 7 Cal. 535, 68 Am. Dec. 280 (1857); Gerber v. Stuart, 1 Mont. 172 (1870). The great weight of authority is, however, the other way, though with much conflict, Avery v. Dougherty, 102 Ind. 443, 2 N. E. 123, 52 Am. Rep. 680 (1885). For what Mr. Justice Lamar calls the "anarchy of the authorities," see the valuable review in Falk v. Moebs, 127 U. S. 597, 8 Sup. Ct. 1319, 32 L. Ed. 266 (1888).

party who thus seeks to change the prima facie character of the contract, seeks to do so on the ground of agency in making the contract, the fact of his agency must be established, for if he acted as an agent without authority he is personally liable.

On the trial of this cause the only evidence was the deposition on the part of the plaintiff. The defendant offered no evidence. There is no evidence to establish the fact of the agency of Temple & Beaupre. In the absence of evidence to prove that fact, those portions of the deposition of the plaintiff indicated by the letters A, B, C, respectively, although under other circumstances they might be competent as evidence tending to show that the plaintiff contracted with them as agents, are not material. They were therefore properly stricken out. This determines the only point raised by the appellant's counsel.

The judgment below is affirmed.

SECTION 5.—PAROL EVIDENCE TO EXPLAIN

HIGGINS v. SENIOR.[11]

(Court of Exchequer, 1841. 8 Mees. & W. 834.)

Special assumpsit for compensation for the non-delivery of iron. Defendant claimed he contracted only as agent.

PARKE, B. The question in this case, which was argued before us (PARKE, ALDERSON, GURNEY, and ROLFE, BB.) in the course of the last term, may be stated to be, whether in an action on an agreement in writing, purporting on the face of it to be made by the defendant, and subscribed by him, for the sale and delivery by him of goods above the value of £10, it is competent for the defendant to discharge himself, on an issue on the plea of non assumpsit, by proving that the agreement was really made by him by the authority of and as agent for a third person, and that the plaintiff knew those facts, at the time when the agreement was made and signed. Upon consideration, we think that it was not: and that the rule for a new trial must be discharged.

There is no doubt, that where such an agreement is made, it is competent to show that one or both of the contracting parties were

[11] Accord: Darrow v. Horne Produce Co. (C. C.) 57 Fed. 463 (1893), in which Baker, J., quotes at large from leading authorities; Weston v. McMillan, 42 Wis. 567 (1877); So. Pac. Co. v. Von Schmidt Dredge Co., 118 Cal. 368, 50 Pac. 650 (1897); Higgins v. Dellinger, 22 Mo. 397 (1856). In Schenck v. Spring Lake Beach Imp. Co., 47 N. J. Eq. 44, 19 Atl. 881 (1890), the doctrine is denied, but this seems to conflict with Borcherling v. Katz, 37 N. J. Eq. 150 (1883), and Smith v. Felter, 63 N. J. Law, 30, 42 Atl. 1053 (1899).

agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to (Garrett v. Handley, 4 B. & Cr. 664; Bateman v. Phillips, 15 East, 272), and charge with liability on the other (Paterson v. Gandasequi, 15 East, 62, post, p. 738), the unnamed principals: and this, whether the agreement be or be not required to be in writing by the Statute of Frauds: and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but shows that it also binds another, by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of the principal.

But, on the other hand, to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party, is not such, would be to allow parol evidence to contradict the written agreement; which cannot be done. And this view of the law accords with the decisions, not merely as to bills of exchange (Sowerby v. Butcher, 2 C. & M. 371; 4 Tyr. 320; Lefevre v. Lloyd, 5 Taunt. 749; 1 Marsh. 318) signed by a person, without stating his agency on the face of the bill; but as to other written contracts, namely, the cases of Jones v. Littledale, 6 Ad. & Ell. 486, 1 Nev. & A. 677, and Magee v. Atkinson, 2 M. & W. 440. It is true that the case of Jones v. Littledale might be supported on the ground that the agent really intended to contract as principal; but Lord Denman, in delivering the judgment of the court, lays down this as a general proposition, "that if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility." And this is also laid down in Story on Agency, § 269. Magee v. Atkinson is direct authority, and cannot be distinguished from this case.

The case of Wilson v. Hart, 7 Taunt. 295, 1 Moore, 45, which was cited on the other side, is clearly distinguishable. The contract in writing was, on the face of it, with another person named Read, appearing to be the principal buyer; but there being evidence that the defendant fraudulently put forward Read as the buyer, whom he knew to be insolvent, in order to pay a debt from Read to himself with the goods purchased, and having subsequently got possession of them, it was held, on the principle of Hill v. Perrott, 3 Taunt. 274, and other cases, that the defendant was liable; and as is observed by Mr. Smith, in the very able work to which we are referred, (Leading Cases, vol. 2, p. 125,) that decision turned altogether upon the fraud, and if it had not, it would have been an authority for the admission of parol evidence to charge the defendant not to discharge Read.

Rule discharged.

BARBRE v. GOODALE.

(Supreme Court of Oregon, 1896. 28 Or. 465, 38 Pac. 67, 43 Pac. 378.)

Action on a contract for logs, executed under seal, by G. W. Handsaker and J. C. Goodale. After about three-fourths of the logs had been delivered Goodale refused to take any more, and Barbre sues to recover under the contract upon parol evidence that Handsaker was Barbre's agent, and had signed the contract in his name instead of Barbre's by consent of defendant. Judgment for plaintiff, and defendant appeals.

WOLVERTON, J.[12] * * * The question is here presented whether it is competent to show by parol testimony that a contract executed by and in the name of an agent is the contract of the principal, where the principal was known to the other contracting party at the date of its execution. There are two opinions touching the question among American authorities,—the one affirming, and the other denying; but the case is one of first impression here, and we feel constrained to adopt the rule which may seem the more compatible with the promotion of justice, and the exaction of honest and candid transactions between individuals. The English authorities are agreed that parol evidence is admissible to show that a written contract executed in the name of an agent is the contract of the principal, whether he was known or unknown; and the American authorities are a unit so far as the rule is applied to an unknown principal, but disagree where he was known at the time the contract was executed or entered into by the parties. All the authorities, both English and American, concur in holding that, as applied to such contracts executed when the principal was unknown, parol evidence which shows that the agent who made the contract in his own name was acting for the principal does not contradict the writing, but simply explains the transaction; for the effect is not to show that the person appearing to be bound is not bound, but to show that some other person is bound also. And those authorities which deny the application of the rule where the principal was known do not assert or maintain that such parol testimony tends to vary or contradict the written contract, but find support upon the doctrine of estoppel; it being maintained that a party thus dealing with an agent of a known principal elects to rely solely upon the agent's responsibility, and is therefore estopped to proceed against the principal.

The underlying principle, therefore, upon which the authorities seem to diverge, is the presumption created by the execution of the contract in the name of the agent, and the acceptance thereof by a party, where the principal is known. Is this presumption conclusive, or is it

[12] Part of the opinion is omitted.

disputable? Without attempting to reconcile the decisions,[18] we believe the better rule to be that the presumption thus created is a disputable one, and that the intention of the party must be gathered from his words, and the various circumstances which surround the transaction, as its practical effect is to promote justice and fair dealing. The principal may have recourse to the same doctrine to bind the party thus entering into contract with his agent. Parol evidence, however, is not admissible to discharge the agent, as the party with whom he has dealt has his election as to whether he will hold him or the principal responsible. This doctrine must be limited to simple contracts, and may not be extended to negotiable instruments and specialties under seal, as they constitute an exception to the rule. As bearing upon these deductions, see 1 Am. & Eng. Enc. Law, 392; Briggs v. Partridge, 64 N. Y. 362, 363, 21 Am. Rep. 617; Nicoll v. Burke, 78 N. Y. 583; New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 380, 12 L. Ed. 465; Nash v. Towne, 5 Wall. 703, 18 L. Ed. 527; Stowell v. Eldred, 39 Wis. 626; Chandler v. Coe, 54 N. H. 561; Ford v. Williams, 21 How. 289, 16 L. Ed. 36; Hunter v. Giddings, 97 Mass. 41, 93 Am. Dec. 54; Trueman v. Loder, 11 Adol. & E. 589; Higgins v. Senior, 8 Mees. & W. 843; Calder v. Dobell, L. R. 6 C. P. 486; Mechem, Ag. §§ 449, 698, 699. If an instrument is valid without a seal, although executed under seal, it is to be treated as written evidence of a simple contract; and the seal adds nothing, except, under our statute, it is made primary evidence of a consideration. Stowell v. Eldred, supra; Byington v. Simpson, 134 Mass. 169, 45 Am. Rep. 314; Rector, etc., v. Wood, 24 Or. 404, 34 Pac. 18, 41 Am. St. Rep. 860.

Now, looking to the contract which is the basis of the cause of action under consideration, we find that it was executed in manner and form as requested by the defendant, and to subserve a special purpose peculiar to his own interest, with the express avowal that it should be treated as the contract of plaintiff, although executed in the name of Handsaker, the agent. It is further disclosed that both the defendant and the plaintiff afterwards so treated it; the plaintiff proceeding under it, and in obedience with the terms and conditions thereof, in cutting, hauling, and banking the logs preparatory to delivery, and the defendant by making payments to him from time to time, sometimes

[18] Some courts limit the operation of this rule to cases where the principal was undisclosed. Ford v. Williams, 62 U. S. (21 How.) 287, 16 L. Ed. 36 (1858), post. p. 791, and others to contracts doubtful upon their face, Armstrong v. Andrews, 109 Mich. 537, 67 N. W. 567 (1896). If the contract clearly states who is liable parol evidence is not admissible to fasten liability on another. Rowell v. Oleson, 32 Minn. 288, 20 N. W. 227 (1884); Vail v. Northwestern L. Ins. Co., 192 Ill. 567, 61 N. E. 651 (1901). The rule can have no application to a case in which the agent had no authority to contract for the principal and has contracted in his own name. Estrella Vineyard Co. v. Butler, 125 Cal. 232, 57 Pac. 980 (1899).

It is not essential that the agent sign the paper in the principal's name, though of course he should do so. It is enough if in the body of the paper it appears that the note is the note of the principal. Haskell v. Cornish, 13 Cal. 45 (1859). Pentz v. Stanton, 10 Wend. 271, 25 Am. Dec. 558 (1833).

directly, and sometimes through Handsaker, the agent. This is ratification, and constitutes a very significant feature of the inquiry. Aside from this, the contract discloses upon its face that a part of the consideration for these logs moved directly from defendant to plaintiff. Under these attendant circumstances, and others which might be alluded to, we think the court committed no error in admitting the testimony to show who were the real parties to the contract, as well as to explain how the clause touching the $1,700 came to be placed therein. The admission of the parol evidence touching this clause may be upheld as being explanatory of the consideration which in part supports the contract. * * * Affirmed.

RICHMOND LOCOMOTIVE & MACHINE WORKS v. MORAGNE.

(Supreme Court of Alabama, 1898. 119 Ala. 80, 24 South. 834.)

Action on two notes signed, "J. M. Moragne, W. B. Beeson, G. W. Wharton, Board of Business Managers." Defense, that defendants were agents of the Etowah Alliance Manufacturing Company, an Alabama corporation, that plaintiff knew this, and so dealt with them in selling some machinery and taking these notes for the price. Plaintiff demurred, the demurrer was overruled, and plaintiff appeals.

McCLELLAN, J. If an agent, in the execution of a promissory note, disclose his principal, make it appear on the face of the paper that it is the contract of the principal, and sign it as agent, of course the principal is bound, the undertaking being within the agency; and the agent is not.[14] On the other hand, if a principal is not disclosed

[14] The distinction between negotiable paper and other simple contracts is stated, and extensively illustrated, in Williams v. Robbins, 82 Mass. (16 Gray) 77, 77 Am. Dec. 396 (1860), and Bank of British North America v. Hooper, 71 Mass. (5 Gray) 567, 66 Am. Dec. 390 (1856). To make liable on commercial paper persons whose names do not appear upon it is alarming. It is important for all parties to know the security, and the parties liable, from the face of the bill. Fenn v. Harrison, 37 R. 761 (1790); Wheeled Scraper Co. v. McMillen, 71 Neb. 686, 99 N. W. 512 (1904); Sydnor v. Hurd, 8 Tex. 98 (1852). Cf. Carpenter v. Farnsworth, 106 Mass. 561, 8 Am. Rep. 360 (1871), in which the words "Ætna Mills" printed in the margin of a check was held enough to make the check the obligation of the Ætna Mills, and not of the agent who signed the check "I. D. Farnsworth, Treasurer," with Casco Nat. Bank v. Clark, 139 N. Y. 310, 34 N. E. 908, 36 Am. St. Rep. 705 (1893), in which it was held that the appearance of "Ridgewood Ice Co." in the margin of a note was not a fact carrying any presumption that the note was, or was intended to be, one of that company.

Indorsement on negotiable paper payable to a corporation by the proper agents in their own names has often been held to be the indorsement of the company. Lay v. Austin, 25 Fla. 933, 7 South. 143 (1889). And so with drafts drawn by the agent. Chipman v. Foster, 119 Mass. 189 (1875). The difference between a maker of paper and the indorser, or the drawer of a bill of exchange is emphasized in Collins v. Buckeye State Ins. Co., 17 Ohio St. 215, 93 Am. Dec. 614 (1867). The acceptor of a bill, however, is treated like the maker of a note, and not like an indorser. Robinson v. Kanawha Valley Bank, 44 Ohio St. 441, 8 N. E. 583, 58 Am. Rep. 829 (1886); Slawson v. Loring, 5 Allen, 340, 81 Am. Dec. 750 (1862).

on the face of the paper, and the party signing describes himself as agent, trustee, or the like, without more, it is the obligation alone of the party whose name is set to the paper, the superadded word or words being mere descriptio personæ, to be disregarded as surplusage; and evidence cannot be received to show that he was in fact the agent or trustee or the like of an undisclosed principal, cestui que trust, or the like, and that the obligation was that of such other person. And, again, if the paper discloses the names of two parties either of whom may be the obligor, and it is doubtful from the whole instrument which of the two is intended to be bound, and the signer describes himself as agent, or as acting in other representative capacity, parol evidence is admissible to show that it is the obligation of the party named in, but not signing, the paper.

These propositions are not only settled by the great weight of authority in other jurisdictions, but they have been several times declared and reaffirmed by this court, and never departed from, as a critical examination of the cases relied on by the appellees themselves will demonstrate. Lazarus v. Shearer, 2 Ala. 718; Baker v. Gregory, 28 Ala. 550, 65 Am. Dec. 366; Drake v. Flewellen, 33 Ala. 106; May v. Hewitt, Id. 161; Ware v. Morgan, 67 Ala. 461; Collins v. Hammock, 59 Ala. 448. In all these cases, where parol evidence was let in, the names of two or more possible obligors appear on the face of the instrument in such way as to render it doubtful from the paper itself which of them was intended to be bound, the question being thus brought within the category last above stated. This is not true of the instrument now before us. The only possible obligors upon it are those whose names are signed to it. The only other name upon the paper is that of the payee. The name of no other possible obligor being disclosed, the words, "Board of Business Managers," following the signatures of the defendants, it being in no wise indicated of what or of whom they are business managers, are merely descriptive of the persons of the signers, and to be wholly disregarded as surplusage. Thus the case is brought within the second category above stated, and the defendants should not have been allowed to plead or prove that it was the intention of the parties to the note to bind the Etowah Alliance Manufacturing Company, of which they were the board of business managers, and not themselves individually.

The rulings of the trial court were not in line with these views, and its judgment must be reversed. The cause is remanded.

RAWLINGS v. ROBSON.

(Supreme Court of Georgia, 1883. 70 Ga. 595.)

CRAWFORD, J. This suit was brought against Georgia Robson, the defendant, to recover of her $360, for six tons of commercial guano. She was sued upon a note given therefor, which was signed "J. A. Robson, agent for wife," and also upon account for guano for the same amount called for by the note.

When the case was called for trial, the court, on motion of defendant's counsel, dismissed it upon the grounds:

(1) Because the note sued upon was the note of J. A. Robson, and not that of his wife, Georgia Robson.

(2) Because the account sued upon was settled by the note, and could not be sued upon.

We think that the court erred in dismissing the suit, on both grounds.

1. Where one signs a note with his own name, and nothing appears upon its face to show that he is acting for another, he will be held personally liable. And so, too, where one signs for another for whom he has no legal authority, as where he adds to his own name the word administrator, executor, guardian, or where he simply adds the word agent, the obligation is held to be a personal one. But in this case whilst J. A. Robson signs his own, instead of his wife's name, it is clear that the intent was to sign for and bind the wife, and that the contract was for her benefit. We think that this paper shows two material facts; one, that the debt was the wife's; the other, that he was her agent to make it. And the failure upon her part, when sued thereon, to plead non est factum, may well be construed into an implied admission of his authority to make it.

Where the principal is distinctly indicated, as in this case, on the face of the paper, such principal, and not the agent, will be the party liable. The rule, however, is that this must appear in some way; the particular form in which it is done is immaterial, if it in fact be done for the principal, and substantially in his or her name, that will be sufficient.[15] Of course such liability will always depend upon the right of the agent to bind the principal; but wherever it exists,

[15] "When the names of both principal and agent appear in the instrument, and the contract, though in the name of the agent, discloses a reference to the business of the principal, so that the instrument as it stands is consistent with either view, of its being the engagement of the principal, or that of the agent, parol evidence is admissible in a suit against the agent to charge him by showing either that credit was given to him or that he had not authority to bind the principal, or to discharge him by proving that the consideration passed directly to his principal," etc. Smith v. Alexander, 31 Mo. 193 (1860). As to when parol evidence may, and when it may not, be admitted, see the elaborate note in 21 L. R. A. (N. S.) 1045 to N. Y. L. Ins. Co. v. Martindale, 75 Kan. 142, 88 Pac. 559, 121 Am. St. Rep. 362, 12 Ann. Cas. 677 (1907); also, Knippenberg v. Greenwood Min. Co., 39 Mont. 11, 101 Pac. 159 (1909).

and the paper shows that he is acting for the principal and not for himself, the principal will be bound. The note here sued, on its face forbids the conclusion that J. A. Robson was the principal; it shows that he was only an agent, and at the same time for whom he was agent. This much appearing in the paper itself authorizes the admission of parol evidence to show who the wife was, for it is no attack upon the writing to do this by additional testimony. See Collins v. Johnson, 16 Ga. 458; Graham v. Campbell, 56 Ga. 258; People v. Superior Court of New York, 10 Wend. 292; Parsons, Notes and Bills, 92, 95, 102; Tiller v. Spradley, 39 Ga. 35.

2. Upon the second ground of the defendant's motion to dismiss the plaintiff's suit, we think that the court also erred. Section 2867 of the Code declares that bank checks and promissory notes are not payment until themselves paid.

In the case of Weaver v. Nixon & Wester [69 Ga. 699], decided September term, 1882, this court held that "a bill, acceptance or promissory note, either of the debtor or of a third person, is no payment or extinguishment of the original demand, unless it is expressly agreed to receive it in payment."

Let the judgment of the court below be reversed.

KEIDAN v. WINEGAR.

(Supreme Court of Michigan, 1893. 95 Mich. 430, 54 N. W. 901, 20 L. R. A. 705.)

McGRATH, J.[16] Plaintiff had judgment upon the following promissory note: "$336.96-100. Grand Rapids, Mich., Dec. 22, 1887. Ninety days after date, I promise to pay to the order of Geo. Keidan three hundred thirty-six and 96-100 dollars at the Old National Bank of Grand Rapids, Mich., value received, with interest at the rate of eight per cent. per annum until paid. W. S. Winegar, Agt."

Defendant, with his plea, filed an affidavit setting forth "that the note, a copy of which is attached to the declaration in said cause, and served upon said deponent, with a copy of said declaration, is not the note of this deponent, defendant as aforesaid; and he denies the same and the execution thereof, and says that he, said defendant, is not indebted to said plaintiff upon said note, nor for any part thereof, nor is he indebted to said plaintiff in any sum whatever, nor in any manner whatever."

Upon the trial defendant offered to show that in 1884, before plaintiff had any dealings with defendant, plaintiff was informed that defendant was carrying on business as the agent of Maggie G. Winegar, and was not doing business for himself; that business relations were then established between plaintiff and said Maggie G. Winegar; that

[16] Part of the opinion is omitted.

said business relations continued from the early part of 1884 to and including the year 1887, and embraced many transactions between plaintiff and Maggie G. Winegar; that many instruments were made between the parties, which were signed exactly as the note sued upon is signed, and that this form of execution had come to be recognized and adopted between the parties as binding Maggie G. Winegar; that during that time no business was transacted by the defendant in his individual capacity, and all the business done was that of his principal, and known and understood to be such by plaintiff; that the said note was given and accepted as the obligation of Maggie G. Winegar; that the note was given for duebills and goods furnished by plaintiff to Maggie G. Winegar, and such duebills and goods were by plaintiff charged to said Maggie G. Winegar on the books of plaintiff; that the taking of these notes did not in the least change the character of the indebtedness; and that defendant never received any benefit or consideration for said note. The court refused to admit the testimony, and directed a verdict for the plaintiff.

The clear weight of authority is that the promise in the present case is prima facie the promise of William S. Winegar, and, as between one of the original parties and a third party, the addition of the word "agent" is not sufficient to put such third party upon inquiry. The question here, however, is whether, as between the immediate parties to the instrument, parol evidence is admissible to show the real character of the transaction.

In his excellent work on Agency, Mr. Mechem lays down the following general rules, which we think are sustained by reason and the weight of authority: "(1) Where the paper, on its face, is the undertaking of the agent only, no reference being made on its face to representative capacity, and where the paper, on its face, is unmistakably the principal's, parol evidence will not be received, in the one case to exonerate, and in the other to charge, the agent. (2) But where the paper bears on its face some reference to a principal, or some appellation indicating representative character, while it is undoubtedly true that the mere addition of the word 'agent,' 'trustee,' 'treasurer,' and the like, or the mere recital in the body of the instrument that the person signing is such agent, treasurer, or trustee of a principal named or unnamed, is, as has been seen, to be regarded, prima facie, as descriptio personæ, merely, and not as characterizing the act as one done in a representative capacity; and while it is true, as a general rule, that parol evidence is not admissible to exonerate an agent from a contract into which he has personally entered, yet it is believed that the preponderance of authority will warrant the statement of the rule that—First, between the immediate parties to a bill or note, parol evidence is admissible to show (a) that, by a course of dealing between the parties, that form of execution has come to be the recognized and adopted form by which the obligation of the principal is entered into; or (b) that the instrument was, to the knowledge of

the parties, intended to be the obligation of the principal, and not of the agent, and that it was given and accepted as such; (c) that an instrument which is so ambiguous upon its face as to render it uncertain who was intended to be bound was known to be intended to be the obligation of the principal." Mechem, Ag. § 443, and cases cited. See, also 1 Amer. & Eng. Enc. Law, 390, 391.

In Metcalf v. Williams, 104 U. S. 93, 26 L. Ed. 665, Mr. Justice Bradley says: "The ordinary rule, undoubtedly, is that if a person merely adds to the signature of his name the word 'agent,' 'trustee,' or 'treasurer,' without disclosing his principal, he is personally bound. The appendix is regarded as a mere descriptio personae. It does not of itself make third persons chargeable with notice of any representative relation of the signer. But if he be in fact a mere agent, trustee, or officer of some principal, and is in the habit of expressing in that way his representative character in his dealings with a particular party, who recognizes him in that character, it would be contrary to justice and truth to construe the documents thus made and used as his personal obligation, contrary to the intent of the parties."

In Kean v. Davis, 21 N. J. Law, 683, 47 Am. Dec. 182, Chief Justice Green says: "The question is not, what is the true construction of the language of the contracting party? Whose language is it? And the evidence is not adduced to discharge the agent from a personal liability which he has assumed, but to prove that in fact he never incurred that liability; not to aid in the construction of the instrument, but to prove whose instrument it is. Now, it is true that the construction of a written contract is a question of law, to be settled by the court upon the terms of the instrument. But whether the contract was in point of fact executed, when it was made, and by whom it was made, are questions of fact, to be settled by a jury, and are provable in many instances by parol, even though the proof conflicts with the language of the instrument itself."

In Hicks v. Hinde, 9 Barb. 528, where an agent drew a bill on his principal for a debt due from the principal to the payee, adding the word "agent" to his signature, and the payee knew that the drawer was authorized by his principal to draw the bill as his agent, and it was the understanding of all parties that the drawer signed only as agent, and not with a view of binding himself, it was held that the drawer was not personally liable on the bill.[17] * * *

As is so often said, it is the intent of the parties which is to be carried out by the courts. The rule that rejects words added to the signature is an arbitrary one. Its reason is not so much that the words are not, or may not be, suggestive, but that they are but sug-

[17] Accord, in a suit between the parties: Hardy v. Pilcher, 57 Miss. 18, 34 Am. Rep. 432 (1879). See the extended review in Knippenberg v. Greenwood Min. Co., 39 Mont. 11, 101 Pac. 159 (1909).

Effect of Negotiable Instruments Law as to descriptio personæ. Haupt v. Vint, 68 W. Va. 657, 70 S. E. 702, 34 L. R. A. (N. S.) 518, post, p. 657 (1911).

gestive, and the instrument, as a whole, is not sufficiently complete to point to other parentage. The very suggestiveness of these added words has given rise to an irreconcilable confusion in the authorities as to the legal effect of such an instrument. Extrinsic evidence, therefore, is admissible in such case, between the immediate parties, to explain a suggestion contained on the face of the instrument, and to carry out the contract actually entered into as suggested, but not fully shown, by the note itself.

The presumption that persons dealing with negotiable instruments take them on the credit of the parties whose names appear should not be absolute in favor of the immediate payee, from whom the consideration passed, who must be deemed to have known all the facts and circumstances surrounding the inception of the note, and with such knowledge accepted a note containing such a suggestion. In the case of Tilden v. Barnard, 43 Mich. 376, 5 N. W. 420, 38 Am. Rep. 197, under a state of facts similar to those offered to be shown here, it was held that defendants there were not liable.

We think that in the present case defendant was entitled to make the showing offered. Under the general issue, defendant was entitled to give in evidence any matter of defense going to the existence of any promise having legal force, as against him. 1 Shinn, Pl. & Pr. § 740.

The judgment is reversed, and a new trial ordered. The other justices concurred.

LIEBSCHER v. KRAUS.

(Supreme Court of Wisconsin, 1889. 74 Wis. 387, 43 N. W. 166, 5 L. R. A. 496, 17 Am. St. Rep. 171.)

ORTON, J. This action was brought on the following promissory note:

"$637.40. Milwaukee, January 1st, 1887. Ninety days after date we promise to pay to Leo Liebscher, or order, the sum of six hundred and thirty-seven dollars and forty cents, value received.

"San Pedro Mining and Milling Company,
"F. Kraus, President."

The plaintiff demands judgment on this note against both the corporation and Frederick Kraus, as joint makers. The defendant Kraus answered that he signed the note for the said San Pedro Mining & Milling Company, as its president, and not otherwise, and that his signature was placed upon said note for the purpose of showing who executed the same on behalf of said company, and as a part of the corporation signature to the note, and for no other purpose. The plaintiff offered to prove on the trial, substantially, that Kraus did not sign the name of the company, but signed his own name as a joint maker, intending to bind himself, and that this

was according to the understanding of the parties at the time. This offer was rejected, and a verdict in favor of Kraus was directed by the court. This evidence is admissible only on the ground that there is an ambiguity in the signatures to the note. If, in the law, this signing imports that both the company and Kraus are jointly bound, or that only the company is bound, there is no ambiguity, and parol evidence to alter or vary this effect is inadmissible. But if, in the law, such signing imports only that both are bound, or the company only is bound, according to the facts and circumstances in explanation of it, and the intention or understanding of the parties, then there is an ambiguity, and the evidence was proper.

The contention of the learned counsel of the appellant that this signing imports that both are bound is inconsistent with the offer of such evidence. The learned counsel of the appellant has expressed, in his brief, the true principle as follows: "As to the question of parol evidence, the rule of law is that such evidence cannot be admitted to vary the terms of a contract, or to show contrary intention than that disclosed by the instrument, unless there is an ambiguity." This has been often decided to be the law by this court. Foster v. Clifford, 44 Wis. 569, 28 Am. Rep. 603; Cooper v. Cleghorn, 50 Wis. 113, 6 N. W. 491; Hubbard v. Marshall, 50 Wis. 322, 6 N. W. 497; Gillmann v. Henry, 53 Wis. 470, 10 N. W. 692.

There appears to be an inconsistency in cases where it is first held that such a note ipso facto binds the person who signed it with his official name, and yet that parol evidence might be given to make it certain. Heffner v. Brownell, 70 Iowa, 591, 31 N. W. 947. This case is mentioned as the only one in which it has been decided that such signing binds the person as well as the corporation; but there would seem to be somewhat of an ambiguity in the opinion. In Bean v. Mining Co., 66 Cal. 451, 6 Pac. 86, 56 Am. Rep. 106, it seems to have been decided that a similar note bound the company alone, but that parol evidence was proper to explain it. No case is cited, and I can find none, where it has been decided squarely that such a note bound both the company and the person whose name appears below, with the name of his office or agency, or bound the company alone, except the case of Chase v. Pattberg, 12 Daly, 171, where the note was: "We promise to pay," etc. "[Signed] English S. M. Co. H. Pattberg, Manager;" and it was decided that the company was not bound, and that Pattberg was.

The authorities are generally the other way. In Draper v. Steam-Heating Co., 5 Allen, 338, the note was: "We promise to pay," etc. "[Signed] Massachusetts Steam-Heating Company. L. S. Fuller, Treasurer." In Castle v. Foundry Co., 72 Me. 167, it was: "We promise to pay," etc., "at office Belfast Foundry Company. [Signed] Belfast Foundry Company. W. W. Castle, President." In Falk v. Moebs, 127 U. S. 597, 8 Sup. Ct. 1319, 32 L. Ed. 266, it was:

"We promise to pay," etc., "to the order of Geo. Moebs, Sec. & Treas., at," etc. "[Signed] Peninsular Cigar Co. Geo. Moebs, Sec. & Treas.," and indorsed "Geo. Moebs, Sec. & Treas." These notes were held to be unambiguous, and not explainable by parol evidence, and the notes of the companies alone. Many other cases of similar signing are found in the above cases and in the text-books. See, also, Mechem, Ag. § 439; 1 Rand. Com. Paper, 188; 1 Daniel, Neg. Inst. §§ 299–305; Gillet v. Bank, 7 Ill. App. 499; Scanlan v. Keith, 102 Ill. 634, 40 Am. Rep. 624; Latham v. Flour-Mills, 68 Tex. 127, 3 S. W. 462; Story, Ag. § 154; Pars. Notes & B. 312.

The question comes very near, if not quite, having been decided by this court in Houghton v. Bank, 26 Wis. 663, 7 Am. Rep. 107, where it is held that an indorsement on a note not belonging to the bank, by "Geo. Buckley, Cas.," he being cashier of the bank, bound the bank and not himself. In Bank v. Bank, 16 Wis. 120, it is held that a note signed by "J. H. Sidmore, Cash.," bound the bank alone. In Rockwell v. Bank, 13 Wis. 653, where the bank promises to pay in the body of the note, and it is signed only by "D. D. Spencer, Cashier," it was held that the bank only was bound.

The principle of these authorities seems to be "that if the agent sign the note with his own name alone, and there is nothing on the face of the note to show that he was acting as agent, he will be personally liable; but if his agency appears with his signature, then his principal only is bound." Here the corporation could not sign its own name, and it is not otherwise shown on the face of the note than that Kraus signed the corporate name, and by adding the word "President" to his own name he shows conclusively that as president of the corporation he signed the note, and not otherwise. Such is the natural and reasonable construction of these signatures, and so it would be generally understood. The affix, cashier, secretary, president, or agent, to the name of the person sufficiently indicates and shows that such person signed the bank or corporate name, and in that character and capacity alone. The use of the word "by" or "per" or "pro" would not add to the certainty of what is thus expressed. It is not common to use these words in commercial business. It is sufficiently understood that the paper is signed by the officer or agent named, and for the corporation. But it is useless to prolong this discussion. It is almost too plain for argument. The note was that of the corporation alone, signed by Kraus as its president.

The circuit court properly rejected the offer of parol proof, and correctly instructed the jury to find a verdict in favor of Kraus. The judgment of the circuit court is affirmed.[18]

[18] An instructive discussion is found in Guthrie v. Imbrie, 12 Or. 182, 6 Pac. 664, 53 Am. Rep. 331 (1885). The note sued on read: "$500. Portland, Oregon, July 8, 1875. For value received, we promise to pay to David Guthrie, or order, ninety days after date, five hundred dollars in U. S. gold coin, without interest. [Signed] James Imbrie, Pres't. [Seal.] J. J. Imbrie, Sec. G. M.

SECTION 6.—EFFECT OF VARIOUS FORMS OF EXECUTION

TUCKER MFG. CO. v. FAIRBANKS.

(Supreme Judicial Court of Massachusetts, 1867. 98 Mass. 101.)

Action on the following bill of exchange: "Boston, March 23, 1866. $4,469.76. Two months after date pay to the order of Messrs. Hiram Tucker & Co. four thousand four hundred and sixty-nine 76/100 dollars, value received, and charge the same to the account of David Fairbanks and Co., Agts. Piscataqua F. & M. Ins. Co. To Piscataqua F. & M. Ins. Co., So. Berwick, Me." The draft was "accepted for the Treasurer, David Fairbanks, President," and was indorsed, "Payable in Boston, Hiram Tucker & Co."

GRAY, J.[19] * * * 3. The question whether the defendants are liable upon the face of the bill requires more consideration. The difficulty is not in ascertaining the general principles which must govern cases of this nature, but in applying them to the different forms and shades of expression in particular instruments. In order to exempt an agent from liability upon an instrument executed by him within the scope of his agency, he must not only name his principal, but he must express by some form of words that the writing is the act of the principal, though done by the hand of the agent. If he expresses this, the principal is bound, and the agent is not. But a mere description of the general relation or office which the person signing the paper holds to another person or to a corporation, without indicating that the particular signature is made in the execution of the office and agency, is not sufficient to charge the principal or to exempt the agent from personal liability. Amid the great variety of language which may be used by merchants in haste or thoughtlessness, ignorant or unmindful of legal rules, or not anticipating the importance of holding one party rather than the other

Co." The seal was that of the Granger Market Company, a corporation. The court held that, but for the seal, there is nothing which purports to bind the corporation. The words, "President," "Sec. G. M. Co.," are merely descriptio personæ. They do not disclose the name of any principal, and are, in fact, too indefinite. But the seal on the face of the note calls for extraneous proof to show why it was put there. It must be assumed it was put there for some purpose. See, also, Brown v. Bradlee, 156 Mass. 28, 30 N. E. 85, 15 L. R. A. 509, 32 Am. St. Rep. 430 (1892), and Reeve v. First Nat. Bank of Glassboro, 54 N. J. Law, 208, 23 Atl. 853, 16 L. R. A. 143, 33 Am. St. Rep. 675 (1891). Heffner v. Brownell, 70 Iowa, 591, 31 N. W. 947 (1887), and Bean v. Pioneer Mining Co., 66 Cal. 451, 6 Pac. 86, 56 Am. Rep. 106 (1885), represent opposite extremes as to the effect of such signatures. On this the later Iowa case of Mathews v. Dubuque Mattress Co., 87 Iowa, 246, 54 N. W. 225, 19 L. R. A. 676 (1893), is interesting. See the dissenting opinion.

[19] Part of the opinion is omitted.

responsible, it must often happen that cases fall very near the dividing line; and, in order to maintain uniformity of decision, it is necessary for the court to refer to the cases already adjudicated, especially within its own jurisdiction.

The authority which at first sight seems most strongly to support the position of the defendants is that of Ballou v. Talbot, 16 Mass. 461, 8 Am. Dec. 146, in which a note signed "Joseph Talbot, Agent for David Perry," was held not to bind Talbot personally. That case has since been recognized and followed in this Commonwealth. Jefts v. York, 4 Cush. 372, 50 Am. Dec. 791; Page v. Wight, 14 Allen, 182. But the important and effective word in Ballou v. Talbot was not the word "agent," nor the name of the principal, but the connecting word "for," which might indeed indicate merely the relation which the agent held to the principal; but which was equally apt to express the fact that the act was done in behalf of the principal, in the same manner as if the words had been transposed thus: "For David Perry, Joseph Talbot, Agent." See Deslandes v. Gregory, 2 El. & El. 602. This is made manifest by considering that if the word "agent" had been wholly omitted, and the form of the signature had been simply "Joseph Talbot, for David Perry," or "For David Perry, Joseph Talbot," it would have been well executed as the contract of the principal, even if it had been under seal, and of course not less so in the case of a simple contract. Long v. Colburn, 11 Mass. 97, 6 Am. Dec. 160; Emerson v. Providence Hat Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66; Mussey v. Scott, 7 Cush. 215, 54 Am. Dec. 719; Met. Con. 105, 110.

On the other hand, in Hills v. Bannister, 8 Cow. 31, a note signed by two persons, with the addition "Trustees of Union Religious Society, Phelps" (who were a legal corporation), was held to bind the signers personally; and in Barker v. Mechanic Insurance Co., 3 Wend. 94, 20 Am. Dec. 664, a note signed "John Franklin, President of the Mechanic Fire Insurance Company," was held on demurrer not to be the note of the company, although alleged to have been made within the authority of the president and the scope of the legitimate business of the corporation; the court saying: "In this case, there is an averment that the president was lawfully authorized; but it does not appear that he acted under that authority; he does not say that he signs for the company; he describes himself as president of the company, but to conclude the company by his acts he should have contracted in their name, or at least on their behalf." The variation between the words "for" and "of" seems at first view slight; but in the connection in which they are used in signatures of this kind the difference is substantial. "Agent of" or "president of" a corporation named simply designates a personal relation of the individual to the corporation. "Agent for" a particular person or corporation may designate either the general relation which the person signing holds to another party, or that the particular act in question is done in

behalf of and as the very contract of that other; and the court, if such is manifestly the intention of the parties, may construe the words in the latter sense. But even "agent for" has been held under some circumstances a mere descriptio personæ of the agent, as in De Witt v. Walton, 9 N. Y. 571, in which the name following these words was not the proper name of the principal, but the name of a newspaper which the agent carried on in the principal's behalf, and a note signed "David Hoyt, Agent for The Churchman," was held to be the note of Hoyt and not of his principal; and in Shattuck v. Eastman, 12 Allen, 369, in which it was held that a paper in the form of a receipt, signed "Robert Eastman, Agent for Ward 6, Lowell, Mass.," if executed under such circumstances as to amount to a contract, might be binding on the agent personally. In Fiske v. Eldridge, 12 Gray, 474, in a careful review of the cases by Mr. Justice Dewey, the New York decisions above mentioned were quoted with approval, and a note signed "John T. Eldridge, Trustee of Sullivan Railroad," was held to be the personal note of Eldridge. In Haverhill Insurance Co. v. Newhall, 1 Allen, 130, a note signed "Cheever Newhall, President of the Dorchester Avenue Railroad Company," was held to bind Newhall personally, although given by him to an insurance company (as was expressed in the note itself) in consideration of a policy issued to the railroad corporation, which he was in fact authorized to obtain and sign the note for. See also Fullam v. West Brookfield, 9 Allen, 1; Morell v. Codding, 4 Allen, 403; Tanner v. Christian, 4 El. & Bl. 591; Parker v. Winslow, 7 El. & Bl. 942; Price v. Taylor, 5 H. & N. 540; Bottomley v. Fisher, 1 H. & C. 211.[20]

[20] The best mode of signature is "A. B., by C. D., Agent." "C. D., for A. B.," though less formally correct, is equally available. Lazarus v. Shearer, 2 Ala. 718 (1841); Exchange Bank v. Lewis County, 28 W. Va. 273 (1886), with many illustrations. "A. B. [for C. D.]," however, has been held the note of A. B., otherwise the brackets seem to have no meaning. Early v. Wilkinson, 9 Grat. (50 Va.) 68 (1852), and "C. D., for A. B.," has sometimes been held to bind C. D., though this was overruled in Robertson v. Pope, 1 Rich. 503, 44 Am. Dec. 267 (1845). But "C. D., Agent for A. B.," binds C. D. Exchange Bank v. Lewis County, 28 W. Va. 273 (1886); Tannant v. Rocky Mt. Nat. Bank, 1 Colo. 279, 9 Am. Rep. 156 (1871); De Witt v. Walton, 9 N. Y. 571, Seld. Notes, 253 (1854); Dawson v. Cotton, 26 Ala. 591 (1855); Peterson v. Homan, 44 Minn. 166, 46 N. W. 303, 20 Am. St. Rep. 564 (1890). "C. D. as Agent for A. B." is generally held to bind A. B. Werner v. Wheeler, 142 App. Div. 358, 127 N. Y. Supp. 158 (1911).

If the name of the principal is signed the execution will be good, even though the agent's name is entirely omitted. Berkey v. Judd, 22 Minn. 287 (1875); Bradlee v. Boston Glass Mfg. Co., 16 Pick. 347 (1835); Western Wheeled Scraper Co. v. McMillan, 71 Neb. 686, 99 N. W. 512 (1904).

An act done under an authority must be done in pursuance of that authority. Clinan v. Cooke, 1 Sch. & Lef. 32, 9 Rev. Rep. 3 (1802). If an agent in filling up a blank note exceeds his authority, the note is not void in toto but only for the excess amount. Johnson v. Blasdale, 9 Miss. (1 Smedes & M.) 17, 40 Am. Dec. 85 (1843). If the contract is separable, it will be upheld to the extent of the authority. Gano v. C. & N. W. Ry. Co., 49 Wis. 57, 5 N. W. 45 (1880). But if there is no way to determine what is authorized and what is not the whole execution is defective. Choteau v. Allen, 70 Mo. 290 (1879).

This case is not distinguishable from those just stated. It differs from Ballou v. Talbot, in omitting the word "for" (the only evidence, contained in the note there sued on, that it was made in behalf of the principal), leaving the words "Agts. Piscataqua F. & M. Ins. Co." as a mere description of the persons signing this bill. The cases of Mann v. Chandler, 9 Mass. 335, Despatch Line of Packets v. Bellamy Manufacturing Co., 12 N. H. 205, 37 Am. Dec. 203, and Johnson v. Smith, 21 Conn. 627, cannot avail the defendants against the later decisions of this court. See Fiske v. Eldridge, 12 Gray, 476; Barlow v. Congregational Society in Lee, 8 Allen, 461, 462. The name of the principal does not appear in the body of the bill. The address of the bill to the corporation and the request to them to charge the amount to the account of the drawers have certainly no tendency to show that the drawers are the same as the corporation, the drawees. The fact that the bill was delivered to the plaintiffs by the insurance company, as shown by the contemporaneous receipt, does not make it the less the promise of the signers. The defendants must therefore be held personally responsible as the drawers of the bill.

Judgment for the plaintiffs.

LOEB v. DRAKEFORD.

(Supreme Court of Alabama, 1883. 75 Ala. 464.)

SOMERVILLE, J.[21] The purpose of the present bill is to claim the benefit of certain mortgages and other collateral securities placed in the hands of Lehman, Durr & Co. by one Thomas B. Dryer, in the latter part of the month of March, in the year 1881. Dryer was indebted to complainants for advances made to him during that year, and also for antecedent debts aggregating about two thousand dollars, and based on previous transactions. The theory of the bill is, that there was an express agreement made by Dryer, during his life-time, that the old, or pre-existing debt should be paid out of these securities. The whole question is as to the existence of such an agreement. It is not contended that such a contract was made with the deceased in person, but only with his authorized agents. * * *

It is claimed, however, that this agreement was authorized by one Felts, who acted under a written power of attorney executed by Dryer, and bearing date March 28th, 1881. The testimony shows very conclusively, that Felts did assent to such an arrangement, claiming his authority under a certain power of attorney, which was at the time exhibited to the other contracting parties. But this was a joint power of attorney, given to W. G. Campbell, M. B. Swanson and W. W. Felts, authorizing the three to act as agents in this transaction jointly. Such a power conferred upon several can not be exercised by one

[21] Part of the opinion is omitted.

alone, at least in the case of private agencies. It is required that all must act together jointly in the execution of such an agency. Caldwell v. Harrison, 11 Ala. 755; Story on Agency, § 42; Evans on Agency (Ewell's Ed.) *32.[22]

Nor could such a trust be delegated by one of such agents to another. The principal is supposed to rely upon the personal integrity and ability of each of his selected agents, these qualifications constituting the reason of the trust. Hence, the maxim applies, "Delegatus non delegare potest." Story on Contr. § 127.

We are satisfied from the testimony that neither Campbell nor Swanson concurred with Felts in the execution of this power. They were not personally present at the time, and are not satisfactorily shown to have afterwards assented to what he did in the attempted execution of their joint authority. The power was not, therefore, legally executed, and the contract made by Felts, acting alone, conferred no lien in favor of the complainants upon the proceeds of the various collateral securities placed by Dryer in the hands of Lehman, Durr & Co.

We see nothing in the record authorizing us to infer that any other person or persons had authority from the deceased either to make or to ratify the contract attempted to be made between Felts and the complainants, as stated in the bill.

The decree of the chancellor is, in our judgment, free from error, and it is affirmed.

GUTHRIE v. ARMSTRONG.

(Court of King's Bench, 1822. 5 B. & Ald. 628, 1 D. & R. 248, 7 E. C. L. 343.)

Assumpsit against the defendant as underwriter on a policy of insurance. Plea, general issue. At the trial at the last assizes for Northumberland before Bayley, J., a question arose as to the execution of the policy by the defendant. In order to prove this, a power of attorney signed by the defendant was produced, by which he constituted

[22] If the power is given to A. & B. as partners, either may act for the partnership. Gorden v. Buchanan, 13 Tenn. (5 Yerg.) 71 (1833); Deakin v. Underwood, 37 Minn. 98, 33 N. W. 318, 5 Am. St. Rep. 827 (1887). If all the joint agents consent, then one may act for all. Robbins v. Horgan, 192 Mass. 443, 78 N. E. 503 (1906).

If the authority shows an intent that part of the agents shall act, then joint execution is not necessary. Cedar Rapids & St. P. R. Co. v. Stewart, 25 Iowa, 115 (1868).

When the power is of a public nature, a majority may act, if all deliberated or had an opportunity to do so. Patterson v. Leavitt, 4 Conn. 50, 10 Am. Dec. 98 (1821), citing Co. Litt. 181b. Especially in matters ministerial. In re Baltimore Turnpike, 5 Bin. 481 (1813). The same rule applies to a committee of directors of a corporation. McNeil v. Boston Chamber of Commerce, 154 Mass. 277, 28 N. E. 245, 13 L. R. A. 559 (1891). It is enough if a meeting has been held which all might have attended, and which a majority did attend, and the act was decided upon a majority vote. Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203 (1841).

fifteen persons, there named, "his true and lawful attorneys, jointly and separately for him, and in his name, to sign and underwrite all such policies of insurance, as they his said attorneys or any of them should jointly and separately think proper." The policy was executed for the defendant, by four of the persons named in the power of attorney. The learned judge thought this a sufficient execution of the power, but reserved the point. The plaintiff having obtained a verdict.

J. Williams moved to enter a nonsuit. This was a naked authority, and must be construed strictly. In Viner's Abridgment, title Authority, B. Pl. 7, it is laid down thus: "If a letter of attorney to make livery of seizin conjunctim et divisim be made to three and two of them make livery, the third being absent, it is not good, for this is not conjunctim nor divisim." And Com. Dig. Attorney, C. 11, is exactly to the same effect. And in Co. Litt. 181b, it is stated, "If a charter of feoffment be made, and a letter of attorney to four, or three, jointly or severally to deliver seizin, two cannot make livery, because it is neither by the four or three jointly, nor any of them severally." Here, the power is to fifteen jointly or severally, and it is neither executed by the whole jointly, nor by one of them severally. The latter words, "or any of them," only apply to the persons who are to exercise the discretion, but they have no reference to the authority itself.

ABBOTT, C. J. The law undoubtedly is as stated by Mr. Williams, but we are not disposed to extend the rule further. Whenever a case exactly similar to those cited shall occur, the Court will feel itself bound by them. But in this case we ought to look at the whole instrument: and if we do so, there is no doubt what the meaning of it is. Here, a power is given to fifteen persons jointly and severally to execute such policies as they or any of them shall jointly or severally think proper. The true construction of this is, as it seems to me, that the power is given to all or any of them to sign such policies, as all or any of them should think proper. The argument is, that the latter words only apply to the persons who are to exercise the discretion. That would have been quite correct, if those had been different from the persons entrusted with the power. But they are the same; these latter words, therefore, control the meaning of the former, and the verdict is right.

Rule refused.

CHAPTER IV

DELEGATION OF THE AUTHORITY

SECTION 1.—GENERAL RULE

CATLIN v. BELL.

(Nisi Prius in King's Bench, 1815. 4 Camp. 183.)

This was an action of assumpsit for not accounting for goods delivered by the plaintiff to the defendant, to be sold on her account.

The defendant is master of a ship trading from this country to the West Indies, and the plaintiff entrusted to him a quantity of millinery goods, which he undertook to sell for her there.

The first defense was, that these goods had paid no duty on exportation; and it was proved that the defendant's ship, in which they were carried, cleared out at the custom-house in ballast. It was contended, therefore, that the adventure was illegal, and that no action could arise out of it.

Lord ELLENBOROUGH. You do nothing unless you show that it formed part of the agreement between the parties to defraud government of the duties. This would contaminate the contract on which the action is founded; but it cannot be affected by the simple circumstance of the ship clearing out in ballast.

It was then stated, that the defendant not being able to sell the goods in the island to which they were destined, had sent them to the Caraccas, in search of a market, where they had been destroyed by an earthquake; but

Lord ELLENBOROUGH clearly held, that there being a special confidence reposed in the defendant with respect to the sale of the goods, he had no right to hand them over to another person, and to give them a new destination.[1]

[1] The same principle has often been applied to public agents and especially to boards and officers of cities and the state. "It is of the greatest public importance to establish the general rule of agency, that 'delegated authority cannot be delegated again, without special power so to do,' as governing the official powers, acts and contracts of our state officers." Lyon v. Jerome, 26 Wend. 485, 37 Am. Dec. 271 (1841); Matthews v. Alexandria, 68 Mo. 115, 30 Am. Rep. 776 (1878); Gale v. Kalamazoo, 23 Mich. 344, 9 Am. Rep. 80 (1871).

BONWELL v. HOWES.

(Common Pleas of New York City and County, 1888. 15 Daly, 43, 2 N. Y. Supp. 717, reversing 1 N. Y. Supp. 435.)

Action to recover commissions as a real estate broker. Judgment for plaintiff, affirmed by the General Term. Defendant again appeals.

VAN HOESEN, J. The motion for a dismissal of the complaint ought to have been granted. It appeared that the defendant never employed the plaintiff's assignor, never knew of such employment until after the exchange of the two pieces of property had been effected, and never authorized or ratified such employment. Of these facts, there cannot be any question. The evidence adduced by the plaintiff showed that Rogers, the plaintiff's assignor, knew that Reuben W. Howes was acting as the agent for his son, John T. Howes, the defendant, in selling the Tenth Avenue property; and that not until after the property had been exchanged for the Haberman property, in Fourth avenue, did Rogers ever have the slightest communication, directly or indirectly, with the defendant. There is no testimony to prove that the defendant was previously aware of Rogers' employment. Upon this state of facts, the court should have granted the motion to dismiss the complaint. Reuben W. Howes, who employed Rogers, was himself an agent to sell, and, as such, he had no right or power to employ a subagent, or to bind the defendant by an agreement that the subagent should receive a commission. Atlee v. Fink, 75 Mo. 100, 42 Am. Rep. 385.

It was said by one of the justices of the city court that the testimony established the fact that it was customary in New York to employ brokers to sell property. That is true, but irrelevant; because the question here is, has one agent any authority to employ another? No proof on that subject was offered. I understand the rule to be that "except where necessity requires, or a known usage of trade justifies, the employment of subagents, an agent whose duties involve personal trust and confidence and the exercise of judgment and discretion, cannot, without authority from his principal, delegate to another the confidence and discretion reposed in him.[2] He may employ another to perform mere mechanical acts, but nothing else. Lewis v. Ingersoll, 3 Abb. Dec. 60. The jury probably regarded Reuben W. Howes as the real owner of the property, and believed they were doing substantial justice in requiring the nominal owner, who holds

[2] The maxim, "delegatus non potest delegare," is based on the fact that agency is generally a personal trust and confidence which cannot be delegated; for the principal employs the agent from his opinion of his personal skill and integrity, and the latter has no right to turn his principal over to another of whom he knows nothing. Wilson v. York & Md. Line R. Co., 11 Gill & J. 58 (1839), quoting 2 Kent's Com.; Warner v. Martin, 11 How. 209, 13 L. Ed. 667 (1850). The distinction between what may and what may not be delegated by an agent is clearly stated and illustrated in Kohl v. Beach, 107 Wis. 409, 83 N. W. 657, 50 L. R. A. 600, 81 Am. St. Rep. 849 (1900).

real estate in his name, to pay the debt that the real owner contracted. But the testimony shows that Rogers knew that Reuben W. Howes was dealing in the character of an agent. If he wished to hold the principal he ought to have ascertained that Reuben had authority to employ a subagent, or else he should have required some instructions from, or had some communication with, the defendant. Hard cases ought not to make bad law; and I am of opinion that it would be dangerous to permit one agent to employ another at the expense of the principal.

Upon a new trial, it may be shown that the principal knew that Reuben W. Howes intended to employ, or had employed, a broker to assist him, and that he approved of the employment. Judgment reversed, and new trial ordered, with costs to abide event.

SECTION 2.—EXCEPTIONS

ELDRIDGE v. HOLWAY.

(Supreme Court of Illinois, 1857. 18 Ill. 445.)

Forcible detainer before a justice. Plaintiff authorized one Cobb to begin the action for him, and Cobb had one Kates serve written notice and demand of possession on defendant. Evidence to prove this being excluded, the jury found for the defendant.

SCATES, C. J. An attorney in fact of plaintiff employed an attorney at law in this case, who served the written notice and demand of possession. The court excluded this evidence, on the ground that delegated authority cannot be delegated.

This is true as a general principle, when properly applied to the classes of cases where personal confidence is reposed, and skill, judgment, etc., are involved. Story on Agency, §§ 12, 13, 14. It was, doubtless, to obviate this literal application of the principle that the convention, out of abundant caution, inserted clause 17 of section 8, art. 1, in the Constitution of the United States, 3 Story, Com. Const. §§ 1236, 1237. Some powers arise, by implication, as incidents to others, and are essential to their exercise. So, in the performance of a general or special agency, many acts are to be performed of an indifferent nature, which may as well be done by one person as another, and which an agent might find it extremely inconvenient to be compelled to perform personally. The maxim withholding the power of subdelegation of authority only has place when there is an object, an end to be gained—where the interest of the principal may be neglected or injured by substitution. When, from the nature

of the act to be done, there can be no difference, the principle cannot apply.

Such is the case here. There is neither confidence, skill, discretion or judgment required to deliver a written notice, and make oath of it, which could prevent the employment of any one by an agent. The service of declarations in ejectment, notices to take depositions, and a great variety of acts now done by attorney's clerks and others, would fall under the same rule contended for, and compel attorneys to do such acts personally.

An attorney may serve such notice and demand, and we perceive no reason why an agent, to bring suit, may not employ an attorney. Agents, as such, cannot appear in courts for parties. Where agents are not licensed as attorneys, they must employ attorneys to appear for the client in the courts.

The act here falls strictly within a class which may be done by such supposed subdelegation. It is rather the true and only mode of acting out an agency where an attorney becomes necessary, than a subdelegation of power.

Had the agency here been an attorneyship, it might present another question—one involving a question of confidence reposed, or skill and judgment—which could not be transferred. But the agency does not appear to be of that character.[s]

Judgment reversed and cause remanded.

NORWICH UNIVERSITY v. DENNY.

(Supreme Court of Vermont, 1874. 47 Vt. 13.)

Assumpsit on a subscription of $200 to induce the location of plaintiff University at Norwich. Verdict for plaintiff.

BARRETT, J. The liability of the defendant for the sum claimed depended on the subscription of his name to the paper presented. If his name was put there by his authorization, then he is liable; if not by his authorization, then he is not liable. Whatever authorization was given, he gave to Dr. Nichols. The question of fact in controversy in the jury trial was, whether the defendant gave such authorization to Dr. Nichols. That was determined by the jury upon legitimate evidence, with proper instructions by the court. It is shown and agreed that the defendant's name was put there by the procurement of Dr. N., pretending to act in virtue of authority from the defendant.

It is now insisted that Dr. N. could not delegate such authority, so as to enable another to make a binding subscription of the defend-

[s] When the transaction has been fully agreed upon, and there remains a mere executive authority to receive the property and pay over the money, the agency may be assigned. Grinnell v. Buchanan, 1 Daly, 538.

ant's name. This cannot be maintained. It is matter of entire indifference for any purpose or reason by what hand the name was written; provided it was done by the procurement of Dr. N. under and in execution of the authority given by the defendant to him. He might as well do it by the fingers of another person, as by the pen of another person. He was not delegating any authority, but only performing an authorized act by a servant, instead of doing it with his own hand. It was the act of his mind and will, and was an effectual doing by him of the act he was authorized to do.

It differs entirely from cases in which the person is authorized to do things requiring the exercise of that person's judgment and discretion, which can be exercised only by the person himself. An arbitrator cannot delegate his function to another; but having heard and decided as arbitrator, he can have another person draw up his award and put his name to it, instead of doing it himself. So in this case, Dr. N. could execute the authority conferred on him by the defendant, by procuring another to use the pen under the direction of his own mind and will, instead of using the pen himself.[4]

Judgment affirmed.

LOUISVILLE & N. R. CO. v. BLAIR.[5]

(Court of Chancery of Tennessee, 1873. 1 Tenn. Ch. 351.)

Bill to call to account and to hold defendant Blair and his sureties on his bond for deficiencies in the accounts of the Nashville Agency of plaintiff. The business was large and varied, the freight bills during the period in question amounting to $863,834.01. Blair was station agent.

COOPER, Ch.[6] * * * It has been left to be inferred from the large deficiency that there must have been negligence. And this is true, but the negligence seems to have been at the Louisville office to which the cashier, whose duty it was, made the regular returns. If that office had been vigilant, and called the attention of their station agent to the increasing deficiency, and he had failed to take the proper steps to prevent it, he would have been clearly guilty of neglect of duty. But it does appear that the defendant, Blair, was not expected to keep the books and was not a book-keeper, and it also appears that the books were kept, the freight bills received and handed out, the freights

[4] The cases go on whether the delegation be of a discretion. Newton v. Bronson, 13 N. Y. 587, 67 Am. Dec. 89 (1854); Weaver v. Carnall, 35 Ark. 198, 37 Am. Rep. 22 (1879) (where the agent was a mere amanuensis). An insurance agent may delegate to another the mere signing of his name to a policy he has approved, Grady v. Am. Cent. Ins. Co., 60 Mo. 116 (1875); but not the power to pass upon applications, Cullinan v. Bowker, 180 N. Y. 93, 72 N. E. 911 (1904).

[5] Accord: Fanset v. Garden Cy. St. Bank, 24 S. D. 248, 123 N. W. 686 (1909), and cases cited.

[6] Part of the opinion is omitted.

received from the collector and remitted by the cashier. These, therefore, were specially his duties. He was employed by the company and reported to it, although in the name of the agent. It is not shown that the station agent was expected to examine these accounts, unless his attention was called to them by the mother office. I am of opinion, consequently, that the complainants have failed to make out a case against defendants on the bond.

But I am also clearly of opinion that the defendant, Blair, was not bound for the faults of either the cashier or collector, unless he was cognizant of them, or connected with them, of which there is no pretence in this case. These agents were employed and paid by the complainant, and were, as the testimony shows, absolutely necessary to the discharge of the duties of the agency. In such a case, it is a matter of no consequence whether the sub-agent was appointed on the recommendation of the chief agent, or appointed directly by him with the sanction of the principal. In all cases of this sort, where the sub-agency is required by the exigency of the business or is authorized by the principal, the agent will not be responsible for the negligence or misconduct of the sub-agent, if he has used reasonable diligence in his choice as to the skill and ability of the sub-agent. Story on Agency, §§ 201, 217a, 321. It is neither charged nor shown that the persons employed as cashier and collector in this case were not good men, and of unexceptionable character when employed; or, in other words, that the defendant, Blair, knew that they were, for any reason, unfit for the discharge of the duties to which they were assigned.

I am of opinion, therefore, that the complainant has wholly failed to make out any case against the defendants; and order that the bill be dismissed with costs.

Note.—This decision was, upon appeal, affirmed.

BLOWERS v. SOUTHERN RY.

(Supreme Court of South Carolina, 1906. 74 S. C. 221, 54 S. E. 368.)

Action by a mail messenger to recover for services in transferring mail matter from one train to another for a period of six years. There was evidence that he did the work under the supervision of the station agent of defendant, who, when Irwin ceased doing the work, hired another man to do it. Judgment for plaintiff and defendant appeals.

JONES, J.[7] * * * An exception is taken to the following charge: "I charge you, further, as a matter of law, if the station agent was authorized by any superior officer who had authority to make this contract and he was carrying out the orders of his superior officer and made a contract that would be within the scope of his authority, and

[7] Part of the opinion is omitted.

the railroad agent, if he is acting under the direction or by the authority of a superior officer who had power and whose duty it was to attend to these matters and make such contracts, if he acted under his orders and direction, then the acts of the agent here would be acts of the superior officer." The specifications of error being: (1) That an agent or officer to whom authority is delegated cannot delegate the authority to another. (2) There was no evidence that any superior officer of defendant company was authorized to make a contract with plaintiff to transfer the mail.

We are not sure from the record but that this charge was made at the request of the defendant, and, if so, defendant cannot raise objection thereto. But, assuming that the charge was not made at the request of defendant, we see nothing in it prejudicial to defendant's contention. The principle delegatus non potest delegare does not apply when there is express or implied authority in the general or superior agent to employ subagents in the work of the principal. "Where an agent has power to employ a subagent, the acts of the subagent, or notice given in the transaction of the business, have the same effect as if done or received by the principal." Bates v. American Company, 37 S. C. 101, 16 S. E. 883, 21 L. R. A. 340. The authority to employ subagents may be implied from the nature of the duties and powers committed to the general agent. 1 Ency. Law, 981.

In this case the superior agent and the alleged subagent were both engaged in the work of the principal in the matter of transportation, and the subagent from the nature of his position and duties was under the direction and supervision of the superior agent in the matter of mail transportation when it became a part of the principal's business. Under such circumstances, if the subagent acts under the orders of a superior officer, his acts become the acts of the superior officer and the principal as well. There was some evidence that the general superintendent of transportation had control of the matter of mail transfer and in the direction and supervision of mail transfer clerks, as already indicated. * * *

Reversal, unless the plaintiff within thirty days remits part of the judgment, which the court found to be excessive.

DARLING v. STANWOOD.

(Supreme Judicial Court of Massachusetts, 1867. 96 Mass. [14 Allen] 504.)

Contract to recover a balance of account for money expended and commissions charged in purchasing cotton for defendant. Verdict for plaintiff.

FOSTER, J.[8] When the defendant employed the plaintiff to buy cotton on his account in the New Orleans market and to ship it to Boston,

[8] Part of the opinion is omitted.

he is presumed to have contemplated that the purchases would be made in the ordinary course of such business at that port. Upon the question whether the plaintiff is liable in damages for negligently or improperly executing such a commission, the evidence of the usages of the cotton trade were clearly admissible, especially as it appears that the defendant himself was well acquainted with them. The employment of a broker to effect the purchases was a justifiable delegation of authority to a sub-agent, because this manner of transacting business was the usual and known custom of the New Orleans market. The statement that the seller of the cotton is understood to warrant that the cotton is sound at the time of sale seems to have been a part of the narrative given by the witnesses of the course of the business; and not an attempt to prove by custom a warranty in a case where none would be implied by law.

In a business which requires or justifies the delegation of an agent's authority to a sub-agent, who is not his own servant, the original agent is not liable for the errors or misconduct of the sub-agent if he has used due care in his selection. The instructions of the presiding judge seem to have been conformable to law and well adapted to the case disclosed by the bill of exceptions. * * *

Exceptions sustained on another question.

SKINNER & CO. v. WEGUELIN EDDOWES & CO.

(Queen's Bench Division of the High Court of Justice, 1882. 1 Cababé & Ellis, 12.)

Action to recover £474 collected on insurance on a ship by defendant's Paris agent, for plaintiff, and not paid over.

DAY, J. The doctrine has always been, that if I employ an agent to do work for me, and he employs a sub-agent, the agent remains responsible to me. On the facts I am clearly of opinion that the defendants are responsible to the plaintiffs for the money received by M. Magniol. Judgment accordingly.

BRADSTREET v. EVERSON.

(Supreme Court of Pennsylvania, 1872. 72 Pa. 124, 13 Am. Rep. 665.)

Action to recover money collected by defendant's Memphis agent, and by him misappropriated. Verdict for plaintiff, and defendant removed the verdict to the supreme court upon error.

AGNEW, J.[9] * * * The next question is upon the nature of the liability arising upon the receipt. It is in the following words:

[9] Part of the opinion is omitted.

"J. M. Bradstreet & Son, Improved Mercantile Agency. Pittsburg, June 2d, 1865. Received of Messrs. Everson, Preston & Co. four duplicate acceptances for collection, versus Watt C. Bradford, Memphis, Tennessee, amounting in all to $1,726.37. [Signed] J. M. Bradstreet & Son."

It is argued, notwithstanding the express receipt "for collection," that the defendants did not undertake for themselves to collect, but only to remit to a proper and responsible attorney, and made themselves liable only for diligence in correspondence, and giving the necessary information to the plaintiffs; or in briefer terms, that the attorney in Memphis was not their agent for the collection but that of the plaintiffs only. The current of decision, however, is otherwise as to attorneys at law sending claims to correspondents for collection, and the reasons for applying the same rule to collection agencies are even stronger. They have their selected agents in every part of the country. From the nature of such ramified institutions we must conclude that the public impression will be, that the agency invited customers on the very ground of its facilities for making distant collections. It must be presumed from its business connections at remote points, and its knowledge of the agents chosen, the agency intends to undertake the performance of the service which the individual customer is unable to perform for himself. There is good reason therefore to hold, that such an agency is liable for collections made by its own agents, when it undertakes the collection by the express terms of the receipt. If it does not so intend, it has it in its power to limit responsibility by the terms of the receipt.

An example of this limited liability is found in the case of Bullitt v. Baird [27 Leg. Int. 171], decided at Philadelphia in 1870; the only case in this state upon the subject of such agencies. There the receipt read: "For collection according to our direction, and proceeds, when received by us, to be paid over to King & Baird." Across the face of the receipt was printed these words: "N. B. The owner of the within mentioned taking all the risks of the mail, of losses by failure of agents to remit, and also of losses by reason of insurrection or war." The limitation of the liability of Bullitt & Fairthorn, by Mr. Bullitt, himself a good lawyer, is evidence of his belief that a greater liability would arise without the restriction.

Recurring to the analogy of attorneys at law, the first point to be considered is the interpretation given by the courts to the terms of a receipt "for collection." In our own state we have several decisions in point. In Riddle v. Poorman, 3 Pen. & W. 224, Riddle, an attorney in Franklin county, gave a receipt in these words: "Lodged in my hands a judgment-bill granted by Henry H. Morwitz to Henry Hoffman for the sum of $1,200, due with interest since the 15th of May 1811, which is entered up in Bedford county, which I am to have recovered if it can be accomplished." Riddle sent this bill to his brother, a practising

lawyer in Bedford. The money was made by the sheriff, but by the neglect of the Bedford Riddle was not received from the sheriff, who became insolvent, and the money was thus lost. Hoffman sued the Franklin county Riddle, on his receipt and recovered. On a writ of error it was contended that the words of the receipt, "which I am to have recovered if it can be accomplished," imported only a limited undertaking to have it collected by another, and not to collect it himself. But this court held that the receipt contained an express and positive undertaking for the collection of the money, if practicable, and not merely for the employment of another to that end; and that the defendant was bound by every principle of moral and legal obligation to make good the collection of the judgment by the application of reasonable diligence, skill and attention.

The next case is Cox v. Livingston, 2 Watts & S. 103, 37 Am. Dec. 486. This was the receipt: "Received of Mr. Thos. Cox, of Lancaster, Pa., for collection, a note drawn in his favor by Mr. Dubbs, calling for $497.65, payable three months after date." The note was left with an instruction to bring suit. The receipt was dated August 30th, 1837, and Livingston died in January following without having brought suit. Dubbs became insolvent. It was held that Livingston was liable for the collection, though only two terms intervened between the receipt and his death.

Krause v. Dorrance, 10 Pa. 462, 51 Am. Dec. 496, was assumpsit against two attorneys for money collected and not paid by another attorney to whom they sent the note for collection. The liability of the original attorneys for the collection was admitted, but the point was made and succeeded, that a demand before suit was necessary. Rogers, J., says expressly they were liable for the acts of the agent whom they employed, but being without fault themselves, a demand was necessary before a resort to an action.

In Rhines v. Evans, 66 Pa. 192, 5 Am. Rep. 364, the receipt was: "Received for collection of A. Rhines one note on Lukens & Beeson, of Rochester, dated October 30th, 1857, for $365." The liability of Evans, the attorney was conceded, and the question was on the Statute of Limitations, and it was held the action was barred by the lapse of seven years and five months from the date of the receipt.

These cases show the understanding of the bench and bar of this state upon a receipt of claims for collection. It imports an undertaking by the attorney himself to collect, and not merely that he receives it for transmission to another for collection, for whose negligence he is not to be responsible. He is therefore liable by the very terms of his receipt for the negligence of the distant attorney, who is his agent, and he cannot shift responsibility from himself upon his client. There is no hardship in this, for it is in his power to limit his responsibility by the terms of his receipt when he knows he must employ another to make the collection. Bullitt v. Baird, supra.

We find cases in other states holding the same doctrine. In Lewis

& Wallace v. Peck & Clark, 10 Ala. 142, both firms were attorneys. The defendants gave their receipt to the plaintiffs for certain notes for collection, and after collecting the money transmitted it to the payees in the notes instead of the attorneys who had employed them, the payees having however endorsed the notes: Held that Peck & Clark were liable to their immediate principals, the plaintiffs, there being no evidence that the payees had given them notice not to pay over to Lewis & Wallace, the original attorneys. This is a direct recognition of the liability of the collecting attorney to the transmitting attorney. The case of Pollard v. Rowland, 2 Blackf. 22, is more directly in point. Rowland received from Pollard claims for collection, and sent them to Stephen, an attorney in another county. Stephen obtained judgment, and collected the money: Held that Rowland was accountable to Pollard for the acts of Stephen to the same extent that Stephen was, and could make no defence that Stephen could not; and that Rowland was liable to Pollard for the money. Cummins v. McLain et al., 2 Pike, 402, was a case nearly similar to the Pennsylvania case of Krouse v. Dorrance, supra. The attorney[10] sent the claim to another attorney at a distance, and was held liable, but for the omission of the plaintiff to make a demand, he failed to recover. The court say the attorney is liable for the acts of the attorney he employs. In a Mississippi case two attorneys, Wilkison and Willison, received of plaintiff a claim for collection, and brought suit and obtained judgment. They dissolved partnership, Wilkison retiring from the practice; and Willison took another partner, Jennings, who received the money from the sheriff. In a suit against Wilkison as surviving partner of Willison, he was held liable for the receipt of the money by Jennings. Wilkinson v. Griswold, 12 Smedes & M. 669.

In view of these reasons and authorities, we hold that a collecting agency, such as the defendants have been found to be, receiving and remitting a claim to their own attorney, who collects the money and fails to pay it over, is liable for neglect.

Judgment affirmed.

SIMPSON v. WALDBY.

(Supreme Court of Michigan, 1886. 63 Mich. 439, 30 N. W. 199.)

Action against defendants, as bankers, for the proceeds of drafts collected by defendant's correspondent, the First National Bank of St. Albans, Vermont. The latter sent its own New York draft for the money, but failed before the draft was paid. Verdict, no cause of action.

[10] The liability of an attorney at law for collections made by a subagent is ably treated in the leading case of Cummins v. Heald, 24 Kan. 600, 36 Am. Rep. 264 (1880), and of a collection agency in Hoover v. Wise, 91 U. S. 308, 23 L. Ed. 392 (1876).

MORSE, J.[11] * * * The counsel for defendants contend here, as they did below, that in the case of collections, like this, where there is no special agreement, the home bank is only responsible for the use of ordinary care and prudence in the selection of the agencies through which it attempts the collection. This is undoubtedly the purport and meaning of the instructions of the court below, taken as a whole, to the jury.

The question is therefore directly before us, what is the law of the case when a person steps into a bank, in the ordinary course of business dealing, and intrusts to it the collection of a draft drawn upon some person residing at a distance, in case the home bank, through the failure or dishonesty of another bank, selected by itself, never receives the money upon such drafts, though the same is paid by the drawee? In the absence of any agreement in regard to the matter, who must bear the loss in case the home bank has not been at fault in the selection of its agent or agents?

There is a conflict of authority upon this proposition; and, as it has never been settled in this state, we must be guided and governed in our action by what seems to us the most correct view in justice and on principle.

It is held in New York, Indiana, Ohio, and New Jersey that the home bank must be the loser, upon the principle that such bank undertakes the collection of the draft or bill, and selects its agent or agents, and must be responsible for their default or neglect, as it would be for the default or neglect of its officers or clerks in the collection of a home bill, or as a contractor would be bound to answer for any negligence or default of his subcontractors or workmen in the performance of his contract. Allen v. Merchants' Bank of New York, 22 Wend. 215, 34 Am. Dec. 289; Reeves v. State Bank of Ohio, 8 Ohio St. 460; Titus v. Mechanics' Nat. Bank, 35 N. J. Law, 588; Ayrault v. Pacific Bank, 47 N. Y. 570, 7 Am. Rep. 489; Abbott v. Smith, 4 Ind. 452; Tyson v. State Bank, 6 Blackf. 225, 38 Am. Dec. 139.

In other states it is adjudged that the customer depositing the draft for collection must be presumed to know, and contract upon the knowledge, that in the ordinary course of business the home bank must employ correspondents or agents abroad to make the collection and transmit the money collected. The holder or maker of the draft, having full notice of the usual course of business, must be held to assent thereto. "He therefore authorizes the bank with whom he deals to do the work of collection through another bank." "The bank receiving the paper becomes an agent of the depositor, with authority to employ another bank to collect it. The second bank becomes the subagent of the customer of the first, for the reason that the customer authorizes the employment of such agent to make the collection." If, therefore, there is no want of ordinary care and prudence in the

[11] Part of the opinion is omitted.

selection of the subagent, and no negligence or fault on the part of the home bank, the customer must be the loser for the default or negligence of such subagent who is regarded as his agent. Guelich v. National St. Bank of Burlington, 56 Iowa, 434, 9 N. W. 328, 41 Am. St. Rep. 110; Dorchester & Milton Bank v. New England Bank, 1 Cush. 177; East Haddam Bank v. Scovil, 12 Conn. 303; Hyde v. Planters' Bank, 17 La. 560, 36 Am. Dec. 621; Ætna Ins. Co. v. Alton City Bank, 25 Ill. 243, 79 Am. Dec. 328; Stacy v. Dane Co. Bank, 12 Wis. 702; Bowling v. Arthur, 34 Miss. 41; Citizens' Bank v. Howell, 8 Md. 530, 63 Am. Dec. 714; Bank of Washington v. Triplett, 1 Pet. 25, 7 L. Ed. 37; Daly v. Butchers' & Drovers' Bank, 56 Mo. 94, 17 Am. Rep. 663; Jackson v. Union Bank, 6 Har. & J. 146; Bank of Louisville v. First Nat. Bank of Knoxville, 8 Baxt. 101, 35 Am. Rep. 691; Morse, Banking, 347–356.

Nearly all the cases cited above, in support of both sides of the question, relate to transactions by which the draft or bill failed of collection by neglect of the notary to make demand in time, or proper protest, or default of the agent in not moving quick enough to make the money.

In the case at bar the draft was collected of the drawee, and the loss of the money resulted from the failure of the St. Albans Bank, before the collection of its draft transmitting such money to defendants. If defendants were negligent or in fault in not immediately forwarding such draft to New York, upon its reception by them, or in its presentation there, they are, in my opinion, liable to plaintiff for the money; but, if there was no negligence in either of these respects, the question arises, who must bear the loss on account of the inability of the St. Albans Bank to meet its draft transmitting the money?

In Reeves v. State Bank of Ohio, supra, it is held that when a bank in Ohio received for collection a draft payable in New York, and for that purpose forwarded the same to its correspondent in New York, such Ohio bank was responsible to the owner of the draft for the conduct of such correspondent, and for the proceeds of the draft immediately upon its collection by such correspondent; that such correspondent was the agent of the Ohio bank, and not the subagent of the owner of the draft, and payment to the agent was payment to the bank, unless there was some agreement or authority between the owner and the bank beyond the mere fact of the draft being received for collection.

In Mackersy v. Ramsays (in the House of Lords) 9 Clark & F. 818, the same doctrine is maintained. Mackersy employed bankers in Edinburgh to obtain for him payment of a bill drawn upon a person in Calcutta. The bankers accepted the employment, and wrote him, promising to credit him with the money when received. They transmitted the bill, in the usual course of business, to bankers in London, and by them it was forwarded to India, where it was duly

paid. The bank in India that collected the money failed, and the Edinburgh bankers did not receive it. They, however, wrote to the drawer of the bill, announcing the fact of its payment, but never actually credited him with the amount thereof on their books. Held, that the Edinburgh bankers were the agents of the drawer to obtain payment of the bill; that, payment having been actually made, they became ipso facto liable to him for the amount received, and that he could not be called upon to suffer any loss occasioned by the conduct of their subagents, between whom and himself there existed no privity. In 56 Iowa, and 9 N. W. 328, supra, an attempt is made to distinguish this case, on the ground that the decision was based upon the fact that the Edinburgh bank expressly undertook to forward the paper, and upon its payment to place the amount thereof to the credit of the depositor, and for the performance of its undertaking it was to receive a commission, and that, upon such a contract, the bank would be bound to give him credit when it was paid to its correspondent, and therefore became directly liable to the customer. But the commission charged was only the usual one among bankers, and banks generally have a commission on collections; in the case at bar it being 35 cents on each $100, which was divided between defendants and the St. Albans Bank. Besides, the opinions, both of Lord Campbell and Lord Cottenham, delivered in the house of lords, were placed upon the broad ground that the Edinburgh bank was liable for the conduct of the bank in India, the same as it would have been for the default or neglect of one of its own officers or clerks in the collection of a home bill, and that its correspondents were its agents, and not the agents of the drawer of the bill, who had no privity with such correspondents; and that the correspondence between the Edinburgh bankers and such drawer, if it proved any special contract, established only such an agreement as the law would have inferred from the dealings between the parties.

The ruling in that case squarely covers the point in issue here, and to my mind is the better doctrine, and most in accord with principle. The learned jurists holding otherwise all admit that, if a person intrusts a home draft or bill to a bank for collection, such bank is responsible to the customer for any negligence or default of its agents, officers, or employés. I cannot see why any different rule should prevail in the collection of a foreign bill. It is in every case that I have examined sought to be maintained upon the theory that the customer knows the bank must act through some other person or persons at a distance, and therefore, impliedly, from the very nature of the course of business, assents to the employment of such persons, and makes them his agents.

This reasoning does not strike me as sound. If I leave an indorsed note against persons in my own town for collection, and consequent demand and protest, I know that some agent or employé of the bank will do the work, or some part of it, and I do not know or inquire

who will do it. I contract, however, with the bank that suitable agents will be employed, and hold it responsible for their acts. The law authorizes me to do this. If I intrust the same bank with the collection of a foreign draft, I also know that they will employ some agent or correspondent abroad, of their selection, not mine, of whom I know nothing, and with whom they are supposed to have business relations. I do not inquire whom they are to select. I presume, and have a right to presume, that they have business knowledge of such agent or agents, which I do not and cannot possess, by the very course of their dealings as bankers. In each case the bank holds itself out, for a consideration, to collect my paper, and it can make no difference whether the compensation is great or small. In each case it selects its own agents in the premises. In each case I have no part in or control over such selection. In each case there is no privity between the party selected and myself. I fail to perceive why, in the one case more than the other, I adopt the immediate party collecting or protesting the bill as my agent. I cannot find any good reason for making this particular case of the collection of a foreign bill an exception to the general rule of agency. The law in general "is clear that, by the employment of under agents or servants for his own convenience, or to perform part of what he has contracted to do, the employer becomes civilly responsible to those with whom he contracts or deals in his business."

Judge Story, in his work on Agency, announces the doctrine thus: "It is a general doctrine of law that the principal is held liable to third persons, in a civil suit, for the frauds, deceits, misrepresentations, torts, negligence, and other malfeasances or misfeasances, or omissions of duty of his agent in the course of his employment, although the principal did not authorize or justify, or, indeed, know of, such misconduct."

In no other case that I can recall is a person presumed, by implication of law, without any agreement to do so, to adopt the subagent of a person with whom he deals as his own. The carrier is responsible for the negligence of his agents and employés, as is also the ship-owner and the contractor. Why this distinction in the case of a banker or bankers? If in their case, why should it not also be made in the case of collecting agents and attorneys? But collecting agents and attorneys have been held to the general rule. Pollard v. Rowland, 2 Blackf. 22; Hoover v. Wise, 91 U. S. 308, 23 L. Ed. 392; Bradstreet v. Everson, 72 Pa. 124, 13 Am. Rep. 665; Lewis v. Peck, 10 Ala. 142.

It has been said by some of the courts that the holding of banks liable for the default and neglect of their correspondents in a case like the present would render the collection of bills and drafts of this nature extremely difficult, and that it would tend very much to destroy the facilities which at present exist, and subject the holders

of bills to inconvenience and expense, and probably, in many cases, to serious loss. But as long as banks and bankers or other persons hold themselves out to collect such bills or drafts for a compensation, or their advantage, they ought to be governed by the same rules of law that apply to other persons, and, if they wish to avoid such responsibility, it is very easy for them to accept such business only upon a special agreement as to their duties and liabilities. Failing to do this, I think they must, in taking such bills or drafts, be responsible, as other business men are, for the misconduct of their selected agents at home or abroad.[12] * * *

Judgment reversed, and a new trial granted.

BANK OF ROCKY MOUNT v. FLOYD.

(Supreme Court of North Carolina, 1906. 142 N. C. 187, 55 S. E. 95.)

Action by the plaintiff bank against Floyd, the Murchison Bank, and others, to recover $1,059, the amount of a check drawn on the Dunn Bank, deposited with plaintiff bank by Floyd for collection, and applied at once to his account to be charged back if the check was not paid. Plaintiff sent the check to the Murchison Bank, and it forwarded it to the Dunn Bank, which failed, and the proceeds were never paid to the Murchison Bank. Judgment against the Murchison Bank.

CONNOR, J.[13] * * * The first question presented for our consideration is the duty of the plaintiff and the Murchison Bank to the

[12] The leading case for this view is Exchange Nat. Bank v. Third Nat. Bank, 112 U. S. 276, 5 Sup. Ct. 141, 28 L. Ed. 722 (1884). Accord: *Arkansas*, Second Nat. Bank v. Bank of Alma, 99 Ark. 386, 138 S. W. 472 (1911); *Indiana*, Tyson v. St. Bank, 6 Blackf. 225, 38 Am. Dec. 139 (1842); *Louisiana*, Martin v. Hibernia Bank, 127 La. 301, 53 South. 572 (1910); *Minnesota*, Streissguth v. Nat. Germ. Am. Bank, 43 Minn. 50, 44 N. W. 797, 7 L. R. A. 363, 19 Am. St. Rep. 213 (1890); *Montana*, Power v. First Nat. Bank, 6 Mont. 251, 12 Pac. 597 (1887), with exhaustive review of the cases; *New Jersey*, Titus v. Mechanics' Nat. Bank, 35 N. J. Law, 588 (1871); *New York*, Allen v. Merchants' Bank, 22 Wend. 215, 34 Am. Dec. 289 (1839); *Ohio*, Reeves v. State Bank, 8 Ohio St. 465 (1858); *England*, Mackersy v. Ramsays, 9 Cl. & Fin. 818, 850 (1843).

When the agent bank expressly stipulates that it will assume no liability for defaults of its subagents, it can, of course, only be held for its own misconduct. Cal. Nat. Bank v. Utah Nat. Bank, 190 Fed. 318, 111 C. C. A. 218 (1911). Equally if the agent bank expressly assumes liability for the correspondent it must respond for defaults of its subagents. Mechanics' Bank v. Earp, 4 Rawle, 384 (1834); Landa v. Traders' Bank, 118 Mo. App. 356, 94 S. W. 770 (1906).

While in this view there is in law no privity between the principal and the subagent, yet the principal has an equitable right to pursue his property, or its proceeds, in the hands of the subagent, or of anyone who cannot establish his right against the true owner, on the ground that he is a bona fide holder. Naser v. First Nat. Bank, 116 N. Y. 492, 27 N. Y. St. Rep. 670, 22 N. E. 1077 (1889).

[13] Part of the opinion is omitted.

owner in dealing with the check. While there is a diversity of opinion and the decisions of the courts are not uniform upon the subject, this court in Bank v. Bank, 75 N. C. 534, approved and adopted the following rule of conduct: "It is well settled that when a note is deposited with a bank for collection, which is payable at another place, the whole duty of the bank so receiving the note in the first instance is seasonably to transmit the same to a suitable bank or other agent at the place of payment. And, as a part of the same doctrine, it is well settled that, if the acceptor of a bill or promissory note has his residence in another place, it shall be presumed to have been intended and understood between the depositor for collection and the bank that it was to be transmitted to the place of residence of the promisor," or, we may add, drawee or payor. In an opinion expressed with his usual force and clearness, Bynum, J., says: "This decision is consonant with notions of justice." This case has been recognized as controlling in this state, and we think is sustained by the weight of authority in other courts and the reason of the thing.

Mr. Morse, in his work on Banks & Banking (volume 1, § 235), thus states the law: "When the paper is payable in some other place than that in which the bank is located, its duty is (1) to forward the bill, or note, or check, in proper season to a subagent selected with due care; (2) to send to such agent any instructions bearing upon its duty that may have been received from its depositor; and (3) to make inquiry with due diligence if notice of the arrival of the paper does not come to it within such time as it might reasonably be expected." He further says: "If a bank fails to do its duty in the matter of collection with reasonable skill and care, it is liable for the damage resulting to any party interested in the paper, whether his name appears on the paper or not." Section 252.

It is conceded that there is much diversity of opinion and decision in respect to the liability of the receiving bank for the default of its subagent, and the courts of the several jurisdictions holding variant views proceed upon entirely distinct and opposite constructions of the implied powers conferred upon the bank first receiving the collection. "If a bank receive a paper for collection on a party at a distant place, the agent it employs at the place of payment is the agent of the owner and not of the bank; and, if the bank selects a competent and reliable agent and gives proper instructions, its responsibility ceases." Bank v. Bank, 71 Mo. App. 451. The two rules are stated by Mr. Morse, and the cases classified, with a discussion of the reason upon which they rest. 1 Banks & Banking, §§ 272–287.

As we have seen, this court has adopted the Massachusetts rule, which is based upon the following satisfactory reason: "The employment of a subagent is justifiable, because this manner of conducting business is the usual and known custom, and in a business which requires or justifies the delegation of an agent's authority to a subagent, who is not his own servant, the original agent is not liable for

the errors or misconduct of the subagent, if he has exercised due care in the selection." Measured by this standard, there can be no doubt in regard to the conduct of the plaintiff bank in sending the check to defendant Murchison Bank; its standing and fitness to discharge the duty being conceded. His honor would have been justified in so instructing the jury. Measured by the same rule, the Murchison Bank would have been in the strict line of its duty in sending its collection to its correspondent in Dunn, but for the fact that the Dunn Bank was the drawee of the check.

This brings us to the pivotal question in the case: Is the drawee or payee of a bill, note, or check a suitable agent to which such paper should be sent for collection? This question has never been decided by this court; hence we must seek for an answer upon the reason of the thing, the general principles underlying the law of agency, and adjudged cases in other jurisdictions. By accepting the collection from the plaintiff bank the Murchison National Bank became, in respect to Floyd's interest, his agent; but, as the amount had been credited to him, the plaintiff was entitled to the proceeds. In this view of the case it is not material whether the Bank of Rocky Mount was the proper party plaintiff, as all of the persons interested were before the court and their relative rights and duties presented for adjustment.

The Missouri Court of Appeals in Bank v. Bank, supra, in answering the question presented here, says: "It was negligence to place a collection, which as a matter of business required prompt attention, in the hands of the debtor to collect from himself. The evidence here discloses the impropriety of the transaction. The defendant sent the check to Burr Oak, where it arrived on the 9th. If it had sent it to some one other than the debtor, it would undoubtedly have been paid, since the bank continued to do business and meet its obligations on the 9th and 10th." Morse on Banks, § 236, says: "The debtor cannot be the disinterested agent of the creditor to collect the debt, and it cannot be considered reasonable care to select an agent known to be interested against the principal to put the latter into the hands of its adversary. Surely it is not due care in one holding a promissory note for collection to send it to the debtor, trusting him to pay, delay, or destroy the evidence of debt as his conscience permits. If this would not be reasonable care and diligence, why should the same conduct be held to be reasonable care and diligence when applied to a bank?" citing Bank v. Packing & Prov. Co., 117 Ill. 100, 7 N. E. 601, 57 Am. Rep. 855. To the same effect are all of the authorities to which we have been cited and which we find in our investigation.

The law is well stated in Ger. Nat. Bank v. Burns, 12 Colo. 539, 21 Pac. 714, 13 Am. St. Rep. 247, in which it is said: "Even if we can conceive of such anomaly as one bank acting as the agent of an-

other to make a collection against itself, it must be apparent that the selection of such an agent is not sanctioned by businesslike prudence and discretion. How can the debtor be the proper agent of the creditor in the very matter of collecting the debt? His interests are all adverse to those of his principal. If the debtor is embarrassed, there is the temptation to delay. * * * The fact that the L. Bank was a correspondent of the defendant to a limited extent does not alter the rule. * * * As a matter of law such method of doing business cannot be upheld. It violates every rule of diligence." In Bank v. Goodman, 109 Pa. 428, 2 Atl. 687, 58 Am. Rep. 728, it is said: "Such suitable agent must, from the nature of the case, be some one other than the party who is to make the payment." Auten, Receiver, v. Bank, 67 Ark. 243, 54 S. W. 337, 47 L. R. A. 329; 1 Dan. Neg. Inst. 328. In Farley Nat. Bank v. Pollock, 145 Ala. 321, 39 South. 612, 2 L. R. A. (N. S.) 194, 117 Am. St. Rep. 44, 8 Ann. Cas. 370, the same principle is announced, and in the note it is said: "The American cases are almost unanimous in support of the doctrine that it is negligence in a bank having a draft or check for collection to send it directly to the drawee." The annotator gives a long list of authorities sustaining this proposition.

The defendant Murchison National Bank, however, insists that it has shown that the custom or usage prevails by which a bank, having a check upon its own correspondent in good standing, may intrust it with the collection. The same point has been frequently made and almost uniformly met with the declaration that such custom, if shown to exist, is invalid. In this connection it is said by the Court of Appeals of Missouri, in Bank v. Bank, supra: "It was said to be customary for banks to transmit collections to their correspondent, even though such correspondent was the debtor. To this we answer that it is not a reasonable custom, and therefore must fail of recognition by the courts. We concede it may be, and perhaps is, in many instances, the most convenient mode for the bank intrusted with the collection. But, if the bank adopts that mode, it takes upon itself the risk of the consequences."

In Min. S. & Door Co. v. Metropolitan Bank, 76 Minn. 136, 78 N. W. 980, 44 L. R. A. 507, 77 Am. St. Rep. 609, the court says: "We cannot agree with counsel that the usage and custom here relied upon as a defense to the claim that the defendant was negligent when forwarding this check to the Mapleton Bank for presentation and payment, as a general usage and custom will not justify negligence. It may be admitted that such a course is frequently adopted, but it must be at the risk of the sender, who transmits the evidence upon which the right to demand payment depends to the party who is to make the payment. Such a usage and custom is opposed to the policy of the law, unreasonable, and invalid." In Farley Nat. Bank v. Pollock, supra, Simpson, J., says: "A custom must be reasonable, and the best-considered cases hold, not only that the bank or party

who is to pay the paper is not the proper person to whom the paper should be sent for collection, but also that a custom to that effect is unreasonable and bad." The same rule is laid down in the notes, and a number of cases cited to sustain it. Morse on Banks, § 236.[14] * * *

No Error.

[14] Accord, as to transmission to the drawee bank for collection: Minneapolis Sash & Door Co. v. Metropolitan Bank, 76 Minn. 136, 78 N. W. 980, 44 L. R. A. 504, 77 Am. St. Rep. 609 (1899); Merchants' Nat. Bank v. Goodman, 109 Pa. 422, 2 Atl. 687, 58 Am. Rep. 728 (1885); Am. Exch. Bank v. Metropolitan Nat. Bank, 71 Mo. App. 451 (1897). Cf. Wilson v. Carlinville Nat. Bank, 187 Ill. 222, 58 N. E. 250, 52 L. R. A. 632 (1900). When the paper is sent by the agent to the debtor for collection in accordance with the instructions of the principal, there is of course no liability if the debtor fails to pay. First Nat. Bank v. Citizens' Sav. Bank, 123 Mich. 336, 82 N. W. 66, 48 L. R. A. 583 (1900).

A leading case for the view that a collecting bank is not liable for the defaults of a sub-agent is Fabens v. Mercantile Bank, 23 Pick. 330, 34 Am. Dec. 59 (1839). Accord: *Connecticut*, Lawrence v. Stonington Bank, 6 Conn. 521 (1827); *Illinois*, Ætna Ins. Co. v. Alton City Bank, 25 Ill. 243, 79 Am. Dec. 328 (1861); *Iowa*, Guelich v. Nat. St. Bank, 56 Iowa, 434, 9 N. W. 328, 41 Am. Rep. 110 (1881), a leading case; *Kansas*, Bank of Lindsborg v. Ober, 31 Kan. 599, 3 Pac. 324 (1884); *Kentucky*, Falls C'y Woolen Mills v. Louisville Nat. Banking Co., 145 Ky. 64, 140 S. W. 66 (1911); *Maryland*, Jackson v. Union Bank, 6 Har. & J. 146 (1823); *Massachusetts*, Dorchester Bank v. New England Bank, 1 Cush. 177, 186 (1848); *Mississippi*, Tiernan v. Com. Bank, 7 How. 648, 40 Am. Dec. 83 (1843); *Missouri*, Landa v. Traders' Bank, 118 Mo. App. 356, 94 S. W. 770 (1906); *Nebraska*, First Nat. Bank v. Sprague, 34 Neb. 318, 51 N. W. 846, 15 L. R. A. 498, 33 Am. St. Rep. 644 (1892); *North Carolina*, Planters' Bank v. First Nat. Bank, 75 N. C. 534 (1876); *Pennsylvania*, Mechanics' Bank v. Earp, 4 Rawle, 386 (1834); *South Dakota*, Fanset v. Garden C'y St. Bank, 24 S. D. 248, 123 N. W. 686 (1909); *Tennessee*, Bank of Louisville v. Bank of Knoxville, 8 Baxt. 101, 105, 35 Am. Rep. 691 (1874); *Wisconsin*, Stacy v. Dane Co. Bank, 12 Wis. 629, 707 (1860); Kohl v. Beach, 107 Wis. 409, 83 N. W. 657, 50 L. R. A. 600, 81 Am. St. Rep. 849 (1900).

When the first agent is negligent, he of course is liable for any losses caused thereby through the default of the subagent. Second Nat. Bank v. Merchants' Nat. Bank, 111 Ky. 930, 65 S. W. 4, 55 L. R. A. 273, 98 Am. St. Rep. 439 (1901).

SECTION 3.—EFFECT OF DELEGATION

HOAG v. GRAVES.[15]

(Supreme Court of Michigan, 1890. 81 Mich. 628, 46 N. W. 109.)

Assumpsit to recover half of $500, alleged to have been collected by defendant through his agent, one Anthony. Hoag was the owner of the amount due on an insurance policy which had been issued on the life of one Sweet, then deceased. Graves, in his interest, arranged with Anthony in New York to collect it, and Hoag gave Anthony a power of attorney, and made a contract with Graves to give him half the amount collected, Graves bearing all costs of collection.

CHAMPLIN, C. J.[16] * * * The fact that the company admitted liability was derived through a letter from Anthony to Graves. Quite a correspondence passed between these parties, and Graves testifies that he showed all of the letters received by him from Anthony to Hoag, and plaintiff testifies that he saw perhaps a dozen such letters. Anthony collected on the 24th of June $500. After several days' delay he retained from the amount $100 for his services, and forwarded a draft for $400, payable to the order of Brice W. Hoag. He receipted to the insurance company for this money as the attorney in fact of Brice W. Hoag. Graves handed the draft over to Hoag, who drew the money upon it, retained $250, and gave $150 to Graves. On July 15, 1887, Anthony collected the balance of $500 from the insurance company, and signed the receipt for the full amount, as follows: "Brice W. Hoag, Creditor of Myron W. Sweet. By D. Edgar Anthony, Attorney in Fact." He kept the whole of the second $500, and the plaintiff claims that Anthony is the subagent of Graves, and not his agent at all. And because the contract between Hoag and Graves, of date June 1, 1887, recites that Graves has in his hands for collection a claim of $1,000 on certificate 3,977 of the National Benefit Society of New York, he is liable to him for $250 collected by Anthony, and which Anthony has neglected and refused to pay over.

[15] Accord: Commercial Bank v. Jones, 18 Tex. 811 (1857); Waldman v. Insurance Co., 91 Ala. 170, 8 South. 666, 24 Am. St. Rep. 883 (1890); Davis v. King, 66 Conn. 465, 34 Atl. 107, 50 Am. St. Rep. 104 (1895). When the agent assumes full responsibility for the undertaking he will be liable for the acts of the subagents, even when the principal knew they would be employed and consented thereto. Raney v. Weed, 5 N. Y. Super. Ct. 577 (1859); Barnard v. Coffin, 141 Mass. 37, 6 N. E. 364, 55 Am. Rep. 443 (1886); Williams v. Moore, 24 Tex. Civ. App. 402, 58 S. W. 953 (1900); Rossiter v. Trafalgar Life Assur. Ass'n, 27 Beav. 377 (1859).

[16] Part of the opinion is omitted.

After hearing all the testimony, the circuit judge charged the jury as follows: "The question presented in this case is one of those interesting ones which arise in trial of cases, and which, by reason of the endless combination of facts, there seems to be no end or limit to. It seems to the court that the controlling question here was whether from the time of the making of the contract of June 1st the man Anthony was under the control of Mr. Graves or of Mr. Hoag; and when that question is solved, it solves the case for that matter. I cannot quite understand how it would be possible that Mr. Graves could be held responsible for the conduct and acts of Mr. Anthony unless he had the power to control him, and, indeed, take the business out of his hands if it became necessary. And it seems to the court that by the power of attorney of January 29th the man Anthony, under the circumstances, as they seem to have been disclosed by the testimony, was the agent of Mr. Hoag; that at the time when the contract of June 1st was made, it was understood between the parties as to what the situation was. If that contract had been intended to have been construed as taking the authority of Mr. Hoag from Mr. Anthony, and putting the control of Mr. Anthony into the hands of Mr. Graves, it hardly seems to me that that kind of a contract would have been drawn. It does not seem to me that the contract goes far enough to do that, and, as I said before, if it does not do that it does not quite seem to me that it could be said that it was understood between the parties that Mr. Graves should be responsible for the acts of Mr. Anthony, except in so far as the contract specifies; that is, he should be liable for his acts in whatever costs he might make, and things of that kind; but for the misfeasance of Mr. Anthony, it does not seem to me that the contract goes far enough. With this in view, it seems to me that the duty is upon the court to instruct the jury to return a verdict for the defendant."

We think the view of the circuit judge is correct. The legal principle involved is well expressed by Mr. Mechem in his work on Agency, at section 197, as follows: "If an agent employs a subagent for his principal, and by his authority, expressed or implied, then the subagent is the agent of the principal, and is directly responsible to the principal for his conduct, and if damage results from the conduct of such subagent, the agent only is responsible in case he has not exercised due care in the selection of the subagent. But if the agent, having undertaken to transact the business of his principal, employs a subagent on his own account to assist him in what he has undertaken to do, he does so at his own risk, and there is no privity between such subagent and the principal. The subagent is therefore the agent of the agent only, and is responsible to him for his conduct, while the agent is responsible to the principal for the manner in which the business has been done, whether by himself or his servant or his agent."

The written agreement cannot be contradicted by parol testimony, but it must be construed in the light of the circumstances and situation of the parties as they existed at the time it was executed. The circumstances were that Hoag had already made Anthony his attorney in fact to liquidate, settle, and adjust this claim against the insurance company. He was at the time the contract of June 1st was entered into the agent and attorney of Hoag, and there is no evidence that he ever revoked his authority. Anthony received the money of the insurance company by virtue of his power of attorney from Hoag, and not by virtue of any authority he received from Graves. He did not act, or claim to act, as the agent of Graves, or by virtue of any authority received from him, and was in no sense a subagent of Graves, but was the immediate agent of Hoag. The authority conferred upon Anthony was to liquidate, settle, and adjust the claim, and this authorized him to receive the money due upon the claim, and thus liquidate it. Hoag recognized this authority in receiving without question the draft as avails of the first payment made upon the claim, and which was received after the execution of the contract of June 1st. The relations between Hoag and Anthony had not changed when Anthony, as the agent of Hoag, received the balance of the claim, and gave a receipt in Hoag's name, by himself as his attorney in fact, in full liquidation of the whole claim.

The plaintiff's cause of action, as stated in his declaration, is that Graves collected $500 through his agent, and neglected and refused to pay plaintiff his half. There was no evidence showing or tending to show that Anthony, who collected the money, was the agent of Graves, but, on the contrary, it was conclusively shown that he was Hoag's agent, and it follows that the plaintiff entirely failed to make his case.

The judgment is affirmed. The other justices concurred.

PART III

EFFECTS AND CONSEQUENCES OF THE RELATION

CHAPTER I

DUTIES AND LIABILITIES OF THE AGENT TO HIS PRINCIPAL

SECTION 1.—LOYALTY

I. In General

LUM v. McEWEN.

(Supreme Court of Minnesota, 1894. 56 Minn. 278, 57 N. W. 662.)

Linn, in behalf of citizens of Brainerd, gave to Clark nominally, to McEwen really, his note for $5,000, in order to induce McEwen to use his influence to have his principals build a railroad to Brainerd. McEwen would have done as he did without the note, and he had no influence in inducing his principals to build the road. Linn sues to have the note adjudged null and void, and delivered up and canceled. On the ground that the note was in circulation, was fair upon its face, and that the contract was still executory, the court below decreed for plaintiff.

Mitchell, J. It is only necessary to consider one of numerous questions argued by counsel. The defendant McEwen was the superintendent and general manager of the business of the Northern Mill Company. That company had a sawmill on Gull river, eight miles from Brainerd, and also a logging railroad extending from Kilpatrick lake, 25 miles from Brainerd, some distance out into the woods. The mill company had under consideration a plan for remodeling its mill, and extending its logging road to Gull river, where the mill was situated. At this juncture of affairs, in consideration of McEwen's agreement to use his influence and authority as superintendent and manager of the mill company to secure the removal of its mill and the extension

of its road to Brainerd, the plaintiff executed the obligation in suit, by which he promised to pay to defendant Clark $5,000 nine months after date, on condition that within that time the mill company extended its logging railroad to Brainerd, and built within the limits of that city a sawmill of a specified capacity. This note was given for the benefit of McEwen, but was made payable to Clark, in order to conceal McEwen's connection with the matter.

That this contract was illegal and void on grounds of public policy will not admit of a moment's doubt. Loyalty to his trust is the first duty which an agent owes to his principal. Reliance upon an agent's integrity, fidelity, and capacity is the moving consideration in the creation of all agencies; and the law condemns, as repugnant to public policy, everything which tends to destroy that reliance. The agent cannot put himself in such relations that his own personal interests become antagonistic to those of his principal. He will not be allowed to serve two masters without the intelligent consent of both.

Actual injury is not the principle the law proceeds on, in holding such transactions void. Fidelity in the agent is what is aimed at, and, as a means of securing it, the law will not permit him to place himself in a position in which he may be tempted by his own private interests to disregard those of his principal.[1] In the matter of determining the policy of removing the mill and extending the road, McEwen, in the discharge of his duties, whether merely that of making recommendations, or of exercising authority to act, owed to his principal the exercise of his best judgment and ability, uninfluenced by any antagonistic personal interests of his own. His attempt to secure $5,000 to himself was calculated to bias his mind in favor of the policy upon which the payment of the money was conditioned, regardless of the interests of the mill company. It is not material that no actual injury to the company resulted, or that the policy recommended may have been for its best interest. Courts will not inquire into these matters. It is enough to know that the agent in fact placed himself in such relations that he might be tempted by his own interests to disregard those of his principal.

The transaction was nothing more or less than the acceptance by the agent of a bribe to perform his duties in the manner desired by the person who gave the bribe. Such a contract is void. This doctrine rests on such plain principles of law, as well as common business

[1] The rule is universal that no one having duties of a fiduciary character to discharge shall be allowed to enter into engagements in which he has, or can have, a personal interest, conflicting, or which possibly may conflict, with the interest of those whom he is bound to protect. Glover v. Ames (C. C.) 8 Fed. 351 (1881); Bedford Coal Co. v. Parke County Coal Co., 44 Ind. App. 390, 89 N. E. 412 (1909).

The rule applies to public agents, and when a board lets a contract in behalf of the public, from which some members of the board are to reap a personal advantage, it is void as against public policy; and it matters not that those who are interested were a minority of the board. People v. Township Board, 11 Mich. 222 (1863).

honesty, that the citation of authorities is unnecessary. The doctrine is perhaps as clearly and concisely expressed as anywhere in Harrington v. Dock Co., 3 Q. B. Div. 549. The fact that the validity of such transaction is attempted to be sustained in courts of justice does not speak well for the state of the public conscience on the subject of loyalty to trusts in business affairs.

This was an action by the maker of the instrument to have it surrendered up and canceled. In view of the relation which he bears to the transaction, there may be some doubt whether courts should give him affirmative relief. But defendants do not raise the point, and we only advert to it in order that this case may not be considered an authority on the question.

Order affirmed.

JANSEN v. WILLIAMS.[2]

(Supreme Court of Nebraska, 1893. 36 Neb. 869, 55 N. W. 279, 20 L. R. A. 207.)

RYAN, C.[3] This action was brought by the defendant in error to recover the sum of $100 retained as commission from the proceeds of the sale of real property, effected by the plaintiffs in error. The petition alleged the employment of plaintiffs in error to sell said real property for the sum of $3,000, and that the plaintiff named in said petition meantime reserved for himself the right to sell said property if he met with an opportunity to do so before the same should be sold by plaintiffs in error; that, soon after such employment, the plaintiff below entered into negotiations with one E. T. Hartley for the sale of said property, and was about to sell said property to said Hartley for the sum of $3,300; that, during such negotiations with said Hartley, plaintiffs in error, for the purpose of preventing the defendant in error from making said sale, and wrongfully compelling the defendant in error to pay plaintiffs in error a commission of $100, induced said Hartley to abandon his negotiations with defendant in error, and agree to pay to them, the plaintiffs in error, $3,000 for said property; and that thereupon plaintiffs in error represented to defendant in error that they had sold said property for $3,000 to a good, responsible party, and induced the defendant in error to execute a deed to Albert W. Jansen, one of the plaintiffs in error, and defendant in error executed the same, believing that said grantee was another than the said plaintiff in error, and thereby deceived and defrauded the defendant in error to defendant in error's damage in the sum of $100.

The answer admits the placing of said property in the hands of plaintiffs in error for sale at $3,000, but alleged that said E. T. Hartley

[2] Accord: Norris v. Tayloe, 49 Ill. 17, 95 Am. Dec. 568 (1868), and Prince v. Dupuy, 163 Ill. 417, 45 N. E. 298 (1896).

[3] Part of the opinion is omitted.

was obtained by plaintiffs in error as an original purchaser, to whom they sold the property without any knowledge of any previous negotiations with defendant in error, and that the deed was taken to said Jansen only for the purpose of securing money advanced to said Hartley, and that the acts in connection with said transaction were in good faith. To this answer there was a reply in the nature of a general denial. * * *

At the request of the defendant in error the court instructed the jury as follows: "An agent ought, as far as possible, to represent his principal; and, to the best of his ability, he should endeavor to successfully accomplish the object of his agency. It is also his duty to keep his principal fully and promptly informed of all the material facts or circumstances which come to his knowledge, and, since he is expected to represent his principal, he cannot have a personal interest adverse to the interest of his principal; and if he deals with the subject-matter of the agency the profits will, as a general rule, belong to the principal, and not to the agent. In all things he is required to act in entire good faith towards his principal. There are duties which the law imposes upon an agent, without any express stipulations on the subject; and one of these duties of an agent is to keep his principal informed of his acts, and to inform him within a reasonable time of sales made, and to give him a timely notice of all facts and circumstances which may render it necessary for him to take measures for his security. An agent cannot act for his principal and for himself in the same transaction, by being both buyer and seller of property, and has no right to act as the agent for others for the purchase of property without the knowledge or consent of such owner, nor to take any advantage of the confidence which his position inspires to obtain the title in himself. If you find that the defendants were the agents of the plaintiff for the sale of the property mentioned in the petition, and that in making the sale they purposely kept from the plaintiff any of the material facts touching said sale, for the purpose of subserving their own interest, and intended to and did keep the plaintiff in the dark as to such facts until after the said sale was consummated, and deed executed by said plaintiff, then I instruct you that they are not entitled to a commission for selling the same."

In Stettnische v. Lamb, 18 Neb. 627, 26 N. W. 374, is this language: "The rule is well settled that a party will not be permitted to purchase an interest in property, and hold it for his own benefit, where he has a duty to perform in relation thereto which is inconsistent with his character as a purchaser on his own account." This statement was sustained by several authorities cited, and of its correctness there can be no doubt. In the light of adjudged cases and of the text-books, therefore, let us see what duty the plaintiffs in error had to perform towards the defendant in error in respect of the real property which was the subject-matter of the agency between them. Upon this subject the following language is found in Pom. Eq. Jur. § 959: "In dealings

without the intervention of his principal, if an agent for the purpose of selling property for the principal purchases it himself, or an agent for the purpose of buying property for the principal buys it from himself, either directly or through the instrumentality of a third person, the sale or purchase is voidable. It will always be set aside at the option of the principal. The amount of consideration, the absence of undue advantage, or other similar features, are wholly immaterial. Nothing will defeat the principal's right of remedy except his own confirmation after full knowledge of all the facts."

In Porter v. Woodruff, 36 N. J. Eq., on page 179 et seq., the following language is found: "The general interests of justice, and the safety of those who are compelled to repose confidence in others, alike demand that the courts shall always inflexibly maintain that great and salutary rule which declares that an agent employed to sell cannot make himself the purchaser, nor, if employed to purchase, can he be himself the seller. The moment he ceases to be the representative of his employer, and places himself in a position towards his principal where his interests may come in conflict with those of his principal, no matter how fair his conduct may be in the particular transaction, that moment he ceases to be that which his service requires, and his duty to his principal demands. He is no longer the agent, but an umpire. He ceases to be the champion of one of the contestants in the game of bargain, and sets himself up as a judge to decide between his principal and himself what is just and fair. The reason of the rule is apparent. Owing to the selfishness and greed of our nature, there must, in the great mass of the transactions of mankind, be a strong and almost ineradicable antagonism between the interests of the seller and the buyer; and universal experience has shown that the average man will not, where his interests are brought in conflict with those of his employer, look upon his employer's interest as more important, and entitled to more protection, than his own. In such cases the courts do not stop to inquire whether the agent has obtained an advantage or not, or whether his conduct has been fraudulent or not. When the fact is established that he has attempted to assume two distinct and opposite characters in the same transaction, in one of which he acted for himself, and in the other pretended to act for another person, and to have secured for each the same measure of advantage that would have been obtained if each had been represented by a disinterested and loyal representative, they do not pause to speculate concerning the merits of the transaction,—whether the agent has been able so far to curb his natural greed as to take no advantage,—but they at once pronounce the transaction void because it is against public policy. The salutary object of the principle is not to compel restitution in case fraud has been committed, or an unjust advantage gained, but to elevate the agent to a position where he cannot be tempted to betray his principal. Under a less stringent rule, fraud might be committed, or unfair advantage

taken, and yet, owing to the imperfections of the best of human institutions, the injured party be unable either to discover it, or prove it in such a manner as to entitle him to redress. To guard against this uncertainty, all possible temptation is removed, and the prohibition against the agent acting in a dual character is made broad enough to cover all his transactions. The rights of the principal will not be changed, nor the capacities of the agent enlarged, by the fact that the agent is not invested with a discretion, but simply acts under an authority to purchase a particular article at a specified price, or to sell a particular article at the market price. No such distinction is recognized by the adjudications, nor can it be established without removing an important safeguard against fraud. Benson v. Heathorn, 1 Younge & C. 326; Conkey v. Bond, 34 Barb. 276, 36 N. Y. 427."

In Ruckman v. Bergholz, 37 N. J. Law, 440, is found the following language: "The judge, distinguishing this case from one where the price was left open to the negotiations of the agent, instructed the jury that, though the plaintiff was interested in the purchase when it was made, he might, nevertheless, recover his commissions as agent, notwithstanding the defendant was not aware of the existence of such interest. In this there was error, for it is a fundamental rule that an agent employed to sell cannot himself be a purchaser, unless he is known to his principal to be such. Dunl. Paley, Ag. 33; Story, Ag. § 210; and other cases cited. And this rule is not inapplicable, nor is it relaxed, when the employment is to sell at a fixed price, for it springs from the prohibitory policy of the law, adopted to prevent the abuse of confidence, and to remove temptation to duplicity. It requires a man to put off the character of agent when he assumes that of principal."

Mechem, Ag., in section 455, states the rule as follows: "The agent will not be permitted to serve two masters without the intelligent consent of both. As is said by a learned judge, so careful is the law guarding against the abuse of fiduciary relations that it will not permit an agent to act for himself and his principal in the same transaction, as to buy of himself, as agent, the property of his principal, or the like. All such transactions are void, as it respects the principal, unless ratified by him with a full knowledge of all the circumstances. To repudiate them, he need not show himself damnified. Whether he has been or not, is immaterial. Actual inquiry is not the principle the law proceeds upon in holding such transactions void. Fidelity in the agent is what is aimed at, and, as a means of securing it, the law will not permit the agent to place himself in a situation in which he might be tempted by his own private interest to disregard that of his principal." Citing People v. Township, 11 Mich. 222. "This doctrine, to speak again in the beautiful language of another, has its foundation, not so much in the commission of actual fraud as in that profound knowledge of the human heart which dictated that hallowed petition, 'Lead us not into temptation, but deliver us from evil,' and that caused the announcement of the infallible truth, 'A man cannot serve two masters.' "

These quotations we shall properly close with the language of Story, Ag. § 210, quoted, with the approval of this court, in Englehart v. Plow Co., 21 Neb. 48, 31 N. W. 391: "In this connection, also, it seems proper to state another rule in regard to the duties of agents, which is of general application, and that is that, in matters touching the agency, agents cannot act so as to bind their principals where they have an adverse interest in themselves. This rule is founded upon the plain and obvious considerations that the principal bargains in the employment for the exercise of the disinterested skill, diligence, and zeal of the agent for his own exclusive benefit. It is a confidence necessarily reposed in the agent, that he will act with a sole regard to the interests of his principal, as far as he lawfully may; and even if impartiality could possibly be presumed on the part of the agent, where his own interests are concerned, that is not what the principal bargains for, and in many cases it is the very last thing which would advance his interest. If, then, a seller were permitted, as an agent of another, to become the purchaser, his duty to his principal and his own interest would stand in direct opposition to each other, and thus a temptation, perhaps in many cases too strong for resistance by men of flexible morals, or hackneyed in the common devices of worldly business, would be held out, which would betray them into gross misconduct, and even into crime. It is to interpose a preventive check against such temptations and seductions that a positive prohibition has been found to be the soundest policy, encouraged by the purest precepts of Christianity."

It is unnecessary to quote further illustrations of the correctness of the instructions given the jury at the request of the defendant in error. The same principles announced in these instructions pervade all the text works, and the decisions of the courts, which have to deal with the relations of principal and agent. In none of them is recognized the right of the suppression of important facts, of which the principal had a right to be informed, as a part of "the secrets of the real-estate business," as was claimed by plaintiff in error Murphy in his testimony. The evidence fully sustains the verdict which was rendered by the jury. Indeed, a verdict different would probably, of necessity, have been set aside, as has been shown by abundant citation of text writers and authorities.

The instructions clearly gave the law to the jury, were applicable to the evidence, and the judgment of the district court must therefore be affirmed. The other commissioners concur.

II. AGENT ACT FOR MORE THAN ONE

THOMPSON v. HAVELOCK.

(Nisi Prius in King's Bench, 1808. 1 Camp. 527, 10 R. R. 744.)

Capt. Thompson was employed as master of defendant's ship, the Lord Nelson. During the time he contracted the ship in the government service in Egypt, the captain to receive 1s. per ton per month and the owner 40s. per ton per month. The government paid both amounts to the defendant, and the plaintiff sues to recover for money had and received.

LORD ELLENBOROUGH. Is it contended that a servant, who has engaged to devote the whole of his time and attention to my concerns, may hire out his services, or a part of them, to another? It would have been a different thing, if the owner had been suing for this money; but I am clearly of opinion that at all events the present plaintiff has no right to it. Under this contract, he must have been taken from superintending the defendant's ship; and I do not know how far it might go, if such earnings could be recovered in a court of justice. No man should be allowed to have an interest against his duty. I will assume, that the plaintiff obtained as high a freight as possible for his owners, and that his services to government were meritorious; still there would be no security in any department of life or of business, if servants could legally let themselves out in whole or in part. My opinion upon the subject is quite decisive: and if it be doubted, I beg that a bill of exceptions may be tendered.[4]

GATY v. SACK.[5]

(Kansas City Court of Appeals, Missouri, 1885. 19 Mo. App. 470.)

Action to recover commissions for obtaining a purchaser for defendant's farm. The agent did not complete a sale, but defendant himself sold the farm to a purchaser, discovered by plaintiff.

PHILIPS, P. J.[6] * * * III. It appears from the record that at the time plaintiff claimed to be acting as agent for defendant he was secretly interested in a farm known as "the Dyke farm." This was

[4] One agent cannot authorize another agent to act to the prejudice of their principal. Adams Express Co. v. Trego, 35 Md. 47 (1872), approved in Clarke v. Kelsey, 41 Neb. 766, 60 N. W. 138 (1894).

[5] Accord: Geiger v. Harris, 19 Mich. 209 (1869), in which the court found that in moments of leisure, or under circumstances when the agent cannot be working for his principal, he may act for another, if without prejudice to his employer.

[6] Part of the opinion is omitted.

the farm he took the said purchaser out to see on the day defendant proposed that he go by to see his farm. Defendant complains that the court excluded evidence offered by him tending to show that the plaintiff concealed from him the fact of this secret interest. The contention of appellant is, that plaintiff's interest, thus concealed, conflicted with his duty as agent for the sale of defendant's land, and should be held to defeat plaintiff's action. In support of this position we are referred to Story on Agency, § 210, and other like authorities.

The rule invoked is "that in matters touching the agency, agents cannot act so as to bind their principals where they have an adverse interest in themselves." This interest manifestly refers to the subject matter of the agency—the thing on which the agent undertakes to act and deal with for the principal. It has no application to the facts of this case. It cannot be so extended as to make it apply to the instance of a real estate agent having his own lands or any other lands for sale, so long as he does not permit his interest in other like transactions to interfere with his duty to his principal. Otherwise a real estate agent could only have on his list of lands for sale one farm at a time, or would not be allowed to sell his own lands, without first advising one of his patrons of his purpose and interest in other tracts. Suppose he did keep the fact of his interest in the Dyke farm concealed from defendant, how did that fact concern the defendant, or in and of itself affect his relation as agent for defendant's land? Defendant does not pretend, or at least he did not offer any proof to the effect, that he would not have intrusted the sale of his land to plaintiff had he known that he was secretly interested in the Dyke farm. * * *

Judgment for plaintiff affirmed.

EVERHART v. SEARLE.

(Supreme Court of Pennsylvania, 1872. 71 Pa. 256.)

THOMPSON, C. J.[1] The case before us is rather novel. It involves a question whether the same person may be an agent in a private transaction for both parties, without the consent of both, so as to entitle him to compensation from both or either. We have the authority of Holy Writ for saying that "no man can serve two masters; for either he will hate the one and love the other, or else he will hold to the one and despise the other." All human experience sanctions the undoubted truth and purity of this philosophy, and it is received as a cardinal principle in every system of enlightened jurisprudence.

The plaintiff below was appointed by one A. S. Flagg, of Massachusetts, agent to sell certain real estate, situate in Luzerne county, Pennsylvania, and was to receive for his compensation all that he might

[1] Part of the opinion is omitted.

realize over $125 per acre. Two days after the date of this authority, to wit, on the 17th day of January 1870, he accepted from the plaintiff in error the contract in writing upon which this suit was brought, promising to pay him $500 as therein set forth, "for his services in assisting him to negotiate a sale and purchase, by him of fourteen of eighteen shares, or all, if he can obtain them conveniently, of the eighteen (shares) of a certain piece or parcel of land situate in Lackawanna township," etc., composed of the same land he was appointed to sell. We need not spend time to argue, what is not susceptible of controversy, that by the terms of the instrument he accepted employment as agent to purchase the same land which he was employed as agent to sell. It is true, the learned judge below, no doubt strongly impressed by the maxim "that the laborer is worthy of his hire," endeavored to make a distinction in the transaction between an undertaking as an agent, and the sale of a preference to the defendant as a buyer. I ought to say, however, that this was hardly his interpretation of the writing, but rather the plaintiff's explanation of his duty under the contract. But the plaintiff, as a witness on the stand, had no right to construe the language of the written contract on which he had brought his suit. There was nothing left out, and no ambiguity in it, and therefore not within the rule of oral explanation. The interpretation was for the court on the terms of the instrument, and they obviously stipulated for the plaintiff's services to assist the defendant in negotiating for the shares mentioned, "or all, if he can obtain them conveniently." He was thus to be acting with the defendant, or by himself, for the defendant, just as the object in view might demand. This was an agency "pure and simple." I do not think, however, that the result as to the plaintiff's claim ought to be at all different from what it is likely to be, on the ground assumed by the learned court; for even on that ground the agent bargained away what his first employer had engaged, viz., his discretion. This was bad faith towards him, and ex maleficio non oritur contractus.

There was plausibility and seeming force in the argument that as Flagg, the plaintiff's principal in the sale, was not injured by the arrangement with the defendant, there was nothing wrong in making that arrangement. This is specious, but not sound.[8] The transaction is to be regarded as against the policy of the law, and not binding upon

[8] If the agent of two principals is honest, "the utmost that can be expected of him is impartiality. But impartiality is exactly the qualification which is inconsistent with agency." British Am. Assurance Co. v. Cooper, 6 Colo. App. 25, 40 Pac. 147 (1895). It is of the essence of the agent's contract that he will use his best skill and judgment to promote the interest of his employer. This he cannot do when he acts for two persons whose interests are essentially adverse. He is therefore guilty of a breach of his contract. Farnsworth v. Hemmer, 1 Allen, 494, 79 Am. Dec. 756 (1861), a leading case, followed in Walker v. Osgood, 98 Mass. 348, 93 Am. Dec. 168 (1867), which distinguished Rupp v. Sampson, 16 Gray, 398, 77 Am. Dec. 416 (1860), post, p. 518.

The agent cannot defend himself behind the double agency by setting up the illegality of the contract. Cottom v. Holliday, 59 Ill. 176 (1871).

a party who has a right to object to it. "It matters not," it is said (page 210, of Hare and Wallace's Notes, 1 Lead. Cases in Eq.), "that there was no fraud meditated and no injury done; the rule is not intended to be remedial of actual wrong, but preventive of the possibility of it." This was said of "any one who acts representatively, or whose office is to advise or operate, not for himself but for others. The principle is general, that a trustee, so far as the trust extends, can never be a purchaser of the property embraced under the trusts without the assent of all the persons interested; and this principle applies to executors, administrators, guardians, attorneys at law, general or special agents, * * * and to all persons, judicial or private, ministerial or counselling, who in any respect have a concern in the sale of the property of others; it extends to sales by public auction, and to judicial sales as well as private." Id. 209. And for this innumerable authorities, English or American, are cited. To the same effect is Campbell v. Pennsylvania Life Insurance Co., 2 Whart. 55; Paley on Agency, 32. "It is a fundamental rule applicable to both sales and purchases, that an agent employed to sell cannot make himself the purchaser; nor if employed to purchase can be himself the seller. The expediency and justice of this rule are too obvious to require explanation. For with whatever fairness he may deal between himself and his employer, yet he is no longer that which his services require and his principal supposes and retains him to be." It is clear from all the authorities, not only those referred to, but those cited in the notes to Fox v. Mackreth and Pott v. Same, 1 Lead. Cases in Eq. 172, not here specially referred to, as also in numerous cases in our reports from Lazarus and Others v. Bryson, 3 Binn. 54, that an agent to sell cannot become an agent to buy. It is against the policy of the law that such a principle should hold. Ex parte Bennett, 10 Vesey, 381. "The ground on which the disqualification rests," it was said in 8 Tomlin's Brown, 72, "is no other than that principle which dictates that a person cannot be both judge and party. No man can serve two masters. He that is intrusted with the interests of others cannot be allowed to make the business and object of interest to himself, because, from a frailty of nature, one who has the power will be too readily seized with the inclination to use the opportunity for serving his own interest at the expense of those for whom he is intrusted. The danger of temptation from the facility and advantage for doing wrong which a particular situation affords, does, out of the mere necessity, work a disqualification."

We regard the case of the plaintiff below within the principles of these citations, although it doubtless appeared to him, as it did to his able counsel and the learned court, that there was nothing of actual or meditated fraud in the transaction; but the learned judge, we think, erred in refusing the defendant's 1st point, and in charging as set forth in the several assignments of error. * * *

Judgment reversed.

ANDREWS v. RAMSAY & CO.

(King's Bench Division of the High Court of Justice [1903]. 2 K. B. 635, 72 L. J. K. B. 865, 89 L. T. 450, 52 W. R. 126.)

Lord ALVERSTONE, C. J. In this case an action was brought to recover a sum of £50., which had been retained by the defendants with the assent of the plaintiff as their remuneration for their services in negotiating the sale of the plaintiff's house. The main point of the case is the suggestion that, because the defendants, while acting as the plaintiff's agents, had received from the purchaser £20. as a secret profit, and because when that was discovered by the plaintiff the defendants had paid over that £20. to the plaintiff, the plaintiff is not entitled to recover back from the defendants the amount retained by them by way of commission. I cannot see how that fact has anything to do with the matter. The £20. was recoverable by the plaintiff from the defendants because it was a secret profit made by them, and came out of the sum which the purchaser would, it may be assumed, have been willing to pay for the house, and it therefore rightly belonged to the plaintiff. That the plaintiff was undoubtedly entitled to the £20. seems to me to have no bearing on the question whether the defendants were entitled to commission from the plaintiff. It is said that the defendants ought not to be called upon to hand over the £50. to the plaintiff because the plaintiff has had the benefit of their services.

The principle of Salomons v. Pender, 3 H. & C. 639, seems to me to govern the case, and it is, in my opinion, amply sufficient to do so. In that case it was held that an agent who was himself interested in a contract to purchase property of his principal was not entitled to any commission from the principal. The principle there laid down is that, when a person who purports to act as an agent is not in a position to say to his principal, "I have been acting as your agent, and I have done my duty by you," he is not entitled to recover any commission from that principal. In Salomons v. Pender, 3 H. & C. 639, 642, Bramwell, B., said: "It is true that * * * the defendant has had the benefit (if it be one) of the plaintiff's services. But the defendant is in a position to say, 'What you have done has been done as a volunteer, and does not come within the line of your duties as agent.'" And in the same case Martin, B., quoted the passage from Story on Agency, p. 262, § 210, where it is said: "In this connection, also, it seems proper to state another rule, in regard to the duties of agents, which is of general application, and that is, that, in matters touching the agency, agents cannot act so as to bind their principals, where they have an adverse interest in themselves. This rule is founded upon the plain and obvious consideration, that the principal bargains, in the employment, for the exercise of the disinterested skill, diligence, and zeal of the agent, for his own exclusive

benefit. It is a confidence necessarily reposed in the agent, that he will act with a sole regard to the interests of his principal, as far as he lawfully may; and even if impartiality could possibly be presumed on the part of an agent, where his own interests were concerned, that is not what the principal bargains for; and in many cases, it is the very last thing which would advance his interests. The seller of an estate must be presumed to be desirous of obtaining as high a price as can fairly be obtained therefor; and the purchaser must equally be presumed to desire to buy it for as low a price as he may."

It seems to me that this case is only an instance of an agent who has acted improperly being unable to recover his commission from his principal. It is impossible to say what the result might have been if the agent in this case had acted honestly. It is clear that the purchaser was willing to give £20. more than the price which the plaintiff received, and it may well be that he would have given more than that. It is impossible to gauge in any way what the plaintiff has lost by the improper conduct of the defendants. I think, therefore, that the interest of the agents here was adverse to that of the principal. A principal is entitled to have an honest agent, and it is only the honest agent who is entitled to any commission. In my opinion, if an agent directly or indirectly colludes with the other side, and so acts in opposition to the interest of his principal, he is not entitled to any commission.[9] That is, I think, supported both by authority and on principle; but if, as is suggested, there is no authority directly bearing on the question, I think that the sooner such an authority is made the better. The result is that the county court judge was right, and this appeal must be dismissed.

WILLS, J., also rendered an opinion.

Appeal dismissed.

RUPP v. SAMPSON.

(Supreme Judicial Court of Massachusetts, 1860. 16 Gray, 398, 77 Am. Dec. 416.)

Contract for "brokerage" on rattans imported in the ships Brothers and Merrimack. Rupp corresponded with one Clew, and got him to come on and meet the defendants, whereupon Clew and defendants made a contract. Verdict for plaintiff, and defendants alleged exceptions.

[9] **Accord:** Cannell v. Smith, 142 Pa. 25, 21 Atl. 793, 12 L. R. A. 395 (1891). The agent cannot recover for his services for two principals, even from one who with full knowledge of the double agency promised to pay him, if it appears that the other principal was ignorant of the situation. Rice v. Wood, 113 Mass. 133, 10 Am. Rep. 459 (1873). And when one principal employs the agent of another having adverse interests, the first principal cannot enforce against the second the contract made through the agent. Bartram & Sons v. Lloyd, 90 L. T. 357, 20 T. L. R. 281 (1904), reversing, on the question of ratification, 88 L. T. 286 (1903).

BIGELOW, C. J. We can see nothing in the conduct of the plaintiff which was fraudulent, or which operated to deceive the defendants in making the agreement to pay him for his services. He made no false representations to them. They knew the nature and value of his services and the extent to which they were beneficial to them. It was wholly immaterial that he was also to receive compensation from the other party. It might well be that the services of the plaintiff were of value to both parties, and that each might be willing to pay according to the benefit received by each. We know of no principle of law, on which an agreement to pay for services rendered, honestly entered into, can be avoided on the ground that another person, having interest wholly distinct and independent, has stipulated by a separate contract to pay for the same services. Both contracts are valid; they are made upon good consideration; and each agrees to make compensation for a benefit which he expects to receive from the bargain. In the present case, there is nothing to show that the commissions which the plaintiff was to receive from both parties were excessive or unreasonable, or that they would together constitute an unusual or extraordinary compensation for the services rendered by him. On the contrary, the jury had found, under the instructions given by the court, that the sum claimed of the defendants had been earned and was due when this action was brought, notwithstanding the contract with the other party for the payment of a like sum.

The claim of the plaintiff would have stood on a very different ground if he had been employed as a broker to buy or sell goods. It would in such cases have been a fraud for him to conceal his agency for one from the other. The interests of buyer and seller are necessarily adverse, and it would operate as a surprise on the confidence of both parties, and essentially affect their respective interests, if one person should without their knowledge act as the agent of both. Farebrother v. Simmons, 5 B. & Ald. 333; Story on Agency, § 31. But the plaintiff did not act in any such capacity. He was not an agent to buy or sell, but only acted as a middleman to bring the parties together, in order to enable them to make their own contracts. He stood entirely indifferent between them, and held no such relation in consequence of his agency as to render his action adverse to the interests of either party. This distinction was taken at the trial and carefully and accurately stated in the instructions given to the jury.[10]

The evidence offered by the defendants as to the usages of trade

[10] The maxim, "no man shall serve two masters," does not apply when an agent acts as to interests that do not conflict, and where loyalty to one is no breach of duty to the other. Nolte v. Hulbert, 37 Ohio St. 445 (1882); Wassell v. Reardon, 11 Ark. 705, 44 Am. Dec. 245 (1851). Nor does the rule operate when both principals have full knowledge of the double agency. Each secures what he contracts for. Bell v. McConnell, 37 Ohio St. 396, 41 Am. Rep. 528 (1881). However, if he finds the interests of his principals conflicting, he should at once take steps to conclude the agency. Morey v. Laird, 108 Iowa, 670, 77 N. W. 835 (1899).

was rightly rejected, because it related to a class of contracts unlike that which was in issue in the present case. It was therefore irrelevant. Exceptions overruled.

III. Adverse Interests of the Agent

(A) Personal Profit

TURNBULL v. GARDEN.

(English Court of Chancery, 1869. 38 L. J. Ch. 331, 20 L. T. Rep. [N. S.] 218.)

James, V. C. In this case the plaintiff, Mrs. Sarah Turnbull, is a widow lady, who has for many years employed the defendant, Mr. R. S. Garden, as her agent in this country for the purpose of receiving the income which was receivable by her in this country, and for the purpose of making payments out of it by her authority. Mr. Garden carries on the business, not only of an army agent, but that of accoutrement maker. I do not know whether this is a full description of his trade. In the course of the year 1867 he caused an attachment to be lodged in the city of London, upon some moneys of the plaintiff in a bank there, to meet a claim of his for a balance of £97. odd, being the result of the cash accounts between him and the plaintiff, the balance upon the receipts on her account,—the debts due to him in his own trade as an accoutrement maker, and payments made by him on her account. She has challenged that account in two or three very important particulars. She says, "There was no such balance as that of £97. due from me, because, in the account which you have rendered to me, you have charged me most extravagant sums for payments made on account of my son, a young cornet who had gone out to India, and as to whom I had written to you to tell you to furnish him with the necessary outfit"; and she says, "That was the only authority I gave you in addition to the earlier authority," an authority which is, no doubt, relied upon by the defendant, and which accompanied the young man when he came to this country, to give him such moneys as were really necessary for him, without going to any extravagant expenditure.

That being the authority, Mr. Garden charged the plaintiff, Mrs. Turnbull, as having paid altogether in respect of the outfit of this young man a sum very nearly amounting to £700., a sum, certainly, which is very startling if supposed to be the cost of a reasonable and proper outfit, which an agent, acting with a due regard to the interests of his employer, would have thought of ordering and sanctioning on behalf of the son of a widowed mother, whose means do not seem to have been, at all events, of a very colossal description. The amount is certainly startling.

Probably the startling extent of the outfit which was furnished to the young man is, to a considerable extent, explained by that which appears with reference to the other charge which the plaintiff makes. The plaintiff says, "In addition to this you have, in my account, charged against me, as money actually paid, moneys which were never paid on my account. You have charged me with a payment to Mr. Daw of £113.; you never paid him any such sum. You have charged me with a payment to Mr. Fagg of £40.; you never paid him any such sum. You have charged me a very much larger sum as paid to Mr. Williams, a tailor; but you never paid him any such sum." The defendant says, "True it is I never did pay any such sums; but I was authorized to charge you more than I actually paid, —to represent to you that I had paid what I had not paid,—I was authorized to do all this by the custom of my trade or profession of army agent." It is not the first time that we have heard in these courts of a custom of this kind. I recollect one case, before the Master of the Rolls, where a custom was alleged by a commission agent in Liverpool of taking his customer's good flour and mixing it with bad flour for the purpose of making a profit. There was another case where a commission agent said it was the custom in his particular trade in Lancashire, not only to charge a commission, but also to alter the invoices by making them higher than what was really paid. That custom did not meet with the approbation of this Court. One might give a great many more instances of customs of that kind; but if there be such a custom as that which is alleged in this case, the sooner that custom is put an end to the better it will be for all persons concerned; and if that custom is carried into effect by the practice, of which there is some trace in this case, of sending in invoices of one sum to the agent and another invoice to be shewn by the person who has received it to the customer, the sooner that is put an end to, I think, the better, with reference to another branch of the law. In this particular case there is some trace of it, although there is no evidence shewing that Mr. Garden has ever received more than one invoice.

The case which Mr. Garden's witnesses make is this: they say there is a trade discount which is known all over the world, in this particular trade and every other trade; that is to say, there is a discount which the one tradesman allows to the other which would not be allowed to the customer. That is put in this way in the affidavit of Mr. Goody: "I say that it is the general, established and well-known and universally recognized custom in the trade of military tailors and outfitters for them to be allowed trade discount by other tradesmen for goods paid for through them, but supplied by such other tradesmen, and to charge their customers with the full amount charged or invoiced by such other tradesmen to or on account of such customers, and to receive and retain such trade discount as and

for their own profit; and I believe that if the plaintiff in this suit had personally purchased and paid for the goods supplied by other persons than the defendant, but paid for by or through him, she would not have been allowed such discount, but would have been charged the full amount which she has been charged." If the case had been brought simply within that principle, that is to say, if it were a mere division of profit between the tradesman and the commission agent, it would stand upon a very different footing. According to that, the charge paid by a gentleman buying an article for himself would have been one thing, while a person in the position of a commission agent going to order it, and receiving a share of the profit as a consequence of giving the order, would have been dealt with on a very different footing.

What appears in this case shews the danger of allowing even the smallest departure from the rule that a person who is dealing with another man's money ought to give the truest account of what he has done, and ought not to receive anything in the nature of a present or allowance without the full knowledge of the principal that he is so acting. The danger of allowing the smallest departure, even to the extent these witnesses have carried it, is shewn in this case. For what does happen with regard to an item in this case? There is the gunmaker, who says, "My price for the guns was £86., but before I had executed the order I was told I should have to send them in to the defendant, and the defendant gave me to understand that he should require £15. per cent. discount on this order, and I immediately increased the price and charged £100. instead of £86., in order that I might give him the discount." That is clearly not a trade discount. It is simply making up a fictitious account against the customer, who has ultimately to pay it, in order that the person who is paying it may pocket the difference at the expense of his employer. The same thing occurred in the case of Mr. Williams, who, having been called upon to make an allowance of £15. per cent. to the defendant, says that he was astonished at the demand, and did not make it in the sense of a trade discount, which he would not have made to any other person, a division of profit between one tradesman and the other. He says, "Having received that intimation from the defendant, I immediately added to the bill £15. per cent., in order that I might take it off in his favour," and Mr. Fagg says, "I allowed him the discount."

These cases all shew that this was a profit taken by the defendant dealing as the agent for the plaintiff, intended to be concealed, and actually concealed from the plaintiff, who had not the slightest knowledge of any custom of the trade that such deduction would be made. I think the items of charge complained of were utterly unwarranted, and that the plaintiff was fully entitled to come into this court to be relieved from any attachment in respect of a balance of

her account based on such charges as these, and I again repeat that the sooner this mode of doing business is put an end to the better for all parties concerned. I am of opinion that the plaintiff is entitled to an account as prayed by the bill from the 17th of January, 1865, on taking which account all discounts so charged must be disallowed against the defendant; and, having regard to the circumstances under which this very large outfit was supplied under such an order as that which was furnished by the plaintiff to him, there ought to be a reference to chambers to inquire how much of that ought to be disallowed in respect of the outfit, having regard to the terms of the authority and any subsequent recognition by the plaintiff of the things charged.

The plaintiff having been driven to come into this court in consequence of the attachment in the Lord Mayor's Court, and having obtained relief upon the ground upon which I hold her to be entitled to relief, and in consequence of the impropriety of the charges made against her in respect of the sums alleged to have been paid but in truth not paid to other persons, I hold she is entitled to all the costs of the suit up to the hearing except as to one part of the case, which seems to have been put into the bill without any foundation whatever, viz., a charge with regard to an advance on jewelry of the plaintiff's daughter, as to which the case has wholly failed. Some expense has been incurred by the evidence given on the one side and on the other as to that part of the case, and the plaintiff must pay the defendant his costs of that part of the suit, and those costs will be set off against the costs which I have ordered him to pay to her.[11]

McKINLEY v. WILLIAMS.

(Circuit Court of Appeals of the United States, Eighth Circuit, 1896. 74 Fed. 94, 20 C. C. A. 312, 36 U. S. App. 749.)

SANBORN, Circuit Judge.[12] The law guards the fiduciary relations with jealous care. It seeks to prevent the possibility of a conflict between the duty and the personal interest of a trustee. It demands that the agent shall work with an eye single to the interest of his principal. It prohibits him from receiving any compensation but his commission, and forbids him from acting adversely to his principal, either for himself or for others. It visits such a breach of duty, not

[11] Approved and illustrated in Morison v. Thompson, L. R. 9 Q. B. 480, 43 L. J. Q. B. 215, 30 L. T. Rep. (N. S.) 869, 22 Wkly. Rep. 859 (1874). A custom or usage for a broker to appropriate to himself the profits of his agency beyond his allowed commissions is not law, for it infringes a fundamental principle of right and wrong. Robinson v. Mollett, 44 L. J. C. P. 362, L. R. 7 H. L. 802, 33 L. T. 544 (1874), reversing 20 W. R. 544, 26 L. T. Rep. (N. S.) 207, L. R. 7 C. P. 84 (1872); Tetley v. Shand, 25 L. T. Rep. (N. S.) 658, 20 W. R. 206 (1872).

[12] Part of the opinion is omitted.

only with the loss of the profits he gains, but with the loss of the compensation which the faithful discharge of duty would have earned. To permit the agent of a vendor to become interested, as the purchaser or as the agent of a purchaser, in the subject-matter of the agency, inaugurates so dangerous a conflict between duty and self-interest, that the law wisely and peremptorily prohibits it. An agent of a vendor, who speculates in the subject-matter of his agency, or intentionally becomes interested in it as a purchaser, or as the agent of a purchaser, violates his contract of agency, betrays his trust, forfeits his commission as agent, and becomes indebted to his principal for the profits he gains by his breach of duty.[18] Warren v. Burt, 12 U. S. App. 591, 595, 7 C. C. A. 105, 107, 58 Fed. 101, 103; Gunn v. Black, 19 U. S. App. 477, 485, 8 C. C. A. 534, 539, 60 Fed. 151, 156; Michoud v. Girod, 4 How. 503, 554, 555, 11 L. Ed. 1076; Crump v. Ingersoll, 44 Minn. 84, 46 N. W. 141; Hegenmyer v. Marks, 37 Minn. 6, 32 N. W. 785, 5 Am. St. Rep. 808; Jacobus v. Munn, 37 N. J. Eq. 48, 53; Moore v. Zabriskie, 18 N. J. Eq. 51; Perry, Trusts, § 919; Bank v. Tyrrell, 27 Beav. 273, 10 H. L. Cas. 26; Panama & S. P. Tel. Co. v. India Rubber, Gutta Percha & Telegraph Works Co., 10 Ch. App. 515, 526; Bent v. Priest, 86 Mo. 475, 482.

This is not the first time this court has been called upon to announce these principles, but the reckless disregard of them, which characterizes the acts of some of the agents whose transactions are portrayed to us, admonishes us that we cannot reiterate them too often, nor enforce them too rigidly. The court below placed the decree from which this appeal was taken upon these indisputable principles. This decree avoids a contract of agency, deprives the agent of his stipulated compensation, and awards to the principal a recovery of $160,827.43, on account of the gains which it finds the agent obtained by violating his contract of agency, and betraying his trust. The agent, John McKinley, appealed from this decree, and his appeal presents two questions: First. Does the proof warrant the finding of the circuit court that the appellant was the agent of the appellee, John M. Williams, to sell leases upon his lands, when he gained

[18] Accord: Porter v. Woodruff, 36 N. J. Eq. 174 (1882); U. S. v. Carter, 217 U. S. 286, 30 Sup. Ct. 515, 54 L. Ed. 769 (1910). Even though the agent is the highest bidder, and the sale is public and free from fraud, he must account to the principal for any profits. Rockford Watch Co. v. Manifold, 36 Neb. 801, 55 N. W. 236 (1893). If the agent learns that more advantageous terms can be obtained than his principal supposes, it is his duty to notify his principal. Snell v. Goodlander, 90 Minn. 533, 97 N. W. 421 (1903). If the agent can secure more, it is his duty to do so, and if he attempt to keep it for himself, his principal can compel him to account for it. Tilleny v. Wolverton, 46 Minn. 256, 48 N. W. 908 (1892). If the agent obtains any advantage by double dealing the law will take it from him. Euneau v. Rieger, 105 Mo. 659, 16 S. W. 854 (1891); Bain v. Brown, 56 N. Y. 285 (1874); Dutton v. Willner, 52 N. Y. 312 (1873).

The agent cannot enforce against a third party any agreement to give him secret profits. Sessions v. Payne, 113 Ga. 955, 39 S. E. 325 (1901).

the profits with which he is charged? And, second, if so, was the highest market value, or the amount which he realized from the property which he thus obtained, the measure of his liability to his principal?

The appellee, Williams, alleged in the bill which he filed in the court below in this case that he was a resident of Chicago, Ill.; that the appellant was a resident of Duluth, Minn.; that the latter was his agent to sell leases of certain mineral lands, which he owned in Minnesota, under a written agreement made between them in August, 1891, to the effect that the appellant should sell and dispose of such leases for the mutual interests of both parties to the contract, and should receive one-fifth of the revenues derived from these lands. He also alleged that, to enable his agent to sell such leases to better advantage, he made a formal lease of the land to the appellant, so that he could make an assignment of it in his own name, or could sublet the lands with the written consent of the appellee; that the appellant thereupon sublet several tracts of these lands, and sold his apparent interest in them, under the formal lease to him, for which he received large amounts of money, promissory notes, and stocks in corporations, which he refused to account for or to turn over to his principal. The prayer of the bill was that the appellant should account for, pay over, and assign to the appellee all the money and property which he had acquired from his dealings with these lands, and that the original contract of agency should be canceled.

The appellant answered this bill. He alleged in his answer that the formal lease, made at the same time as the contract of agency, was an actual lease; that, under it, he became liable to pay the rents reserved, and obtained the right to all the profits he had realized by selling any part of his leasehold interest thereunder, or by subletting any part of the land described therein. He also alleged that the appellee knew of the profits he was gaining at the times when he received them; that he, nevertheless, assented to the leases and contracts through which he obtained them, and consented that he should retain these profits for his own benefit. * * *

The court found that the appellant had not made out the extraordinary contract set forth in his answer, and affirmed the decree below for appellee.

(B) Dealings with the Principal

CONKEY v. BOND.[14]

(Court of Appeals of New York, 1867. 36 N. Y. 427, 3 Abb. Prac. [N. S.] 415.)

Action to rescind a sale of stock in the Oswego Starch Company, made by defendant to plaintiff, and to recover the price paid therefor, and certain payments made by the plaintiff as a stockholder. The opinion shows the essential facts. Defendant appealed from order for new trial. See 34 Barb. 276.

PORTER, J. The fact that the defendant volunteered his agency did not absolve him from the duty of fidelity, in the relation of trust and confidence which he sought and assumed. The plaintiff was induced to purchase at an extravagant premium, stock of the value of which he was ignorant, on the mistaken representations of the defendant, who professed to have none which he was willing to sell. This assurance very naturally disarmed the vigilance of the respondent, and he availed himself of the defendant's offer by authorizing him to buy at the price he named.

The defendant did not buy, but sent him a certificate for the amount required, concealing the fact that he had not acted under the authority, and that the stock transferred was his own.

There is no view of the facts in which the transaction can be upheld. He stood in a relation to his principal which disabled him from concluding a contract with himself, without the knowledge or assent of the party he assumed to represent. He undertook to act at once as seller and as purchaser. He bought as agent and sold as owner. The ex parte bargain, thus concluded, proved advantageous to him and very unfortunate for his principal. It was the right of the latter to rescind it, on discovery of the breach of confidence. It is not material to inquire whether the defendant had any actual fraudulent purpose. The making of a purchase from himself without authority from the plaintiff was a constructive fraud in view of the fiduciary relation which existed between the parties. In such a case, the law delivers the agent from temptation by a presumptio juris et de jure, which good intentions are unavailing to repel. It is unnecessary to state our views more fully on this question, as it is fully and ably discussed in the opinion delivered by Judge Bacon in the court below, 34 Barb. 276, and his conclusions are abundantly fortified by authority. Gillett v. Peppercorne, 3 Beav. 78; Story, Agency, § 214; Michoud v. Girod, 4 How. 555, 11 L. Ed. 1076; Davoue v. Fanning, 2 Johns. Ch. 268, 270; Moore v. Moore, 5 N. Y. 262; N. Y. Cent. Ins. Co. v. Protection Ins. Co., 14 N. Y. 91; Gardner v. Ogden, 22 N. Y. 347, 78 Am. Dec. 192.

The objection that this theory is inconsistent with that stated in the

[14] Accord: Salsbury v. Ware, 188 Ill. 505, 56 N. E. 149 (1900).

complaint is not sustained by the record. The essential facts are alleged, and the appropriate relief is demanded. The fact that the complaint alleged other matters which the plaintiff failed to establish, impairs neither his right nor his remedy. Utile per inutile non vitiatur.

The order of the Supreme Court should be affirmed, with judgment absolute for the respondent. All concur.

RICH v. BLACK.

(Supreme Court of Pennsylvania, 1896. 173 Pa. 92, 33 Atl. 880, 37 Wkly. Notes Cas. 499.)

Bill for an account and a reconveyance of real estate. Defendants were given the sale of the land at not less than $3,000 per acre. Interlocutory decree for plaintiff. Defendant appeals.

STERRETT, C. J. The rule of public policy which avoids, at the instance of the cestui que trust, purchases made by agents for sale, is practically absolute in its character. Courts of equity view such transations with jealous eye; and it is only under special circumstances, amounting to a dissolution of the trust relation, when the parties have dealt at arm's length, that their validity is recognized. Davoue v. Fanning, 2 Johns. Ch. 254. And the reasons are obvious. On the one hand, the relation which such agents bear is confidential, and disarms the vigilance of their principals. It affords peculiar facilities for obtaining exclusive information in respect of the property intrusted to them for sale. Their employment implies that they have superior advantages for making sales, and that they will use every effort and means to obtain the highest price for the benefit of their principals. On the other hand, their individual interest is to purchase at the lowest price, and places them in a position which is inconsistent with the faithful and proper discharge of the duties of the trust. The opportunity will naturally lead to temptation, to abuse, and, as was aptly said by Mr. Chancellor Kent in Davoue v. Fanning, supra, be poisonous in its consequences.

The cestui que trust is not bound to prove, nor is the court bound to judge, that the trustee has made a bargain advantageous to himself. The fact may be so, and yet the party not have it in his power distinctly and clearly to show it. "There may be fraud," as Lord Hardwicke observed, "and the party not able to prove it." Thus an agent, by virtue of his trust relation, may discover valuable minerals in the land, and, locking the knowledge in his breast, take advantage of it in making a contract with his cestui que trust. If he deny it, how can the court find the fact? "The probability is that a trustee who has once conceived such a purpose will never disclose it, and the cestui que trust will be effectually defrauded." Ex parte Lacey, 6 Ves. 627. So he may take advantage of his superior knowledge of the market

and skill in manipulation to obtain results beneficial to himself. "It is to guard against this uncertainty and hazard of abuse, and to remove the trustee from temptation, that the rule does and will permit the cestui que trust to come, at his own option, and without showing actual injury, and insist upon having the experiment of another sale" (Davoue v. Fanning, supra); or, as was held in our own case of Swisshelm's Appeal, 56 Pa. 475, 94 Am. Dec. 107, treat the purchase as inoperative in respect of the land unsold by the trustee, and compel an account of the proceeds of sale made by him to innocent purchasers for value. "This is a remedy that goes deep, and touches the very root of the matter." Davoue v. Fanning, supra; Leisenring v. Black, 5 Watts, 303, 30 Am. Dec. 322; Parshall's Appeal, 65 Pa. 224; Rice v. Davis, 136 Pa. 439, 20 Atl. 513, 20 Am. St. Rep. 931; Murphy v. O'Shea, 2 Jones & La. T. 422. The cestui que trust must, it is true, move within a reasonable time; but what shall amount to a reasonable time will depend on circumstances, and lies in the discretion of the court. In the absence of special circumstances which may lengthen or shorten the time, the analogy of the law is followed. Marshall's Estate, 138 Pa. St. 285, 22 Atl. 90.

These appellants misapprehend the rationale of this rule. They insist that because, as they claim, the sale was satisfactory to Mrs. Rich, the rule has no application. Conceding that in the first instance it was satisfactory, that fact would not take away her option to rescind; for these appellants then and for a long time afterwards ostensibly maintained towards her the character of agents for sale, and willfully concealed the fact of their own interest. They maintain their characters of inconsistency even now by claiming not only title as purhasers, but commissions as agents for sale. Roll, whom they first reported as the purchaser, confessedly knew nothing of it. The alleged interest of Gillespie and Neeb is more than doubtful, and, if it ever existed, was soon parted with. To all practical intents and purposes, these agents were the real purchasers, without the knowledge of their cestui que trust. Rosenberger's Appeal, 26 Pa. 67. However Mrs. Rich may have felt in the first instance in regard to the sale, it is not likely that it would have been satisfactory had she been fully informed of the facts. When she gave her agents a minimum price, it was manifestly intended as a guide to them in negotiating sale, and implied a just expectation on her part and an engagement on theirs that they would make an honest endeavor to obtain a higher price.

If Roll, Gillespie, and Neeb were really intending purchasers, the obvious course was that these agents for sale should take competitive bids. They did not occupy the position of middlemen with equal duty to both. Their primary duty was to Mrs. Rich. But, so far as appears, no bona fide effort was made by them to perform this duty. Instead, Mrs. Rich was asked to take less, and, when this was refused, they hastened to avail themselves of the minimum price in their own

interest, and had already made large profits before Mrs. Rich's discovery of the facts. If they could realize profits for themselves, they could and should have done so for their cestui que trust. That was their employment, and that their undertaking; and equity will treat that as done which ought to have been done. To sustain the purchase made in these circumstances would work "actual injury" to Mrs. Rich, tend to encourage breaches of trust, and violate a wise rule of public policy.

Having taken action in time, the plaintiff was entitled to the relief which the decree of the court below is intended to secure. Decree affirmed, and appeal dismissed, with costs to be paid by appellants; and it is ordered that the record be remitted to the court below for further proceedings.

SHANNON v. MARMADUKE.

(Supreme Court of Texas, 1855. 14 Tex. 217.)

Land was sold at public sale by Shannon, as agent of Marmaduke, at 51 cents per acre, Shannon's brother becoming the purchaser. Two years later, the latter conveyed to Shannon. Suit to have the land conveyed to Marmaduke.

WHEELER, J. It is the well-settled general rule that a person cannot act as agent for another and become himself the buyer. "He cannot be both buyer and seller at the same time, or connect his own interest in his dealings as an agent or trustee for another. It is incompatible with the fiduciary relation. Emptor emit quam minimo potest, venditor vendit quam maximo potest. The rule is founded on the danger of imposition and the presumption of the existence of fraud inaccessible to the eye of the court. The policy of the rule is to shut the door against temptation, and which, in the cases in which such a relationship exists, is deemed to be of itself sufficient to create the disqualification. This principle, like most others, may be subject to some qualification in its application to particular cases, but, as a general rule, it appears to be well settled in the English and in our American jurisprudence." 4 Kent, Com. 438. It is affirmed by Judge Story, in his treatise on Agency, that this doctrine is recognized in the fullest manner by the civil law. And he shows by ample references that it is the fully-recognized and well-established doctrine, not only of the English and American jurisprudence, but also of the civil law. This reason is assigned: that there is a natural incompatibility between the interest of the buyer and that of the seller. Story on Agency, § 10. It is a rule, he says, in regard to the duties of agents, which is of general application, that in matters touching the agency agents cannot act so as to bind their principals where they have an adverse interest in themselves. "This rule is founded

on the plain and obvious consideration that the principal bargains, in the employment for the exercise of the disinterested skill, diligence, and zeal of the agent, for his own exclusive benefit." Id., § 210, et seq.

Although the fact is not proved by positive evidence that the purchase in this instance was made directly or indirectly by the defendant, yet the relationship subsisting between himself and the nominal purchaser, the inadequacy of price, and more especially the reconveyance to the defendant unexplained, afford strong circumstantial evidence tending to that conclusion. Positive evidence of such secret understandings between parties can rarely be obtained. They are, by means of such evidence, seldom "accessible to the eye of the court," and hence the attendant circumstances must be looked to in order to ascertain the real character of the transaction. But there is another fact disclosed by the evidence which speaks with a controlling force. That is the admission of the defendant that he was only authorized to sell the land when it would bring three dollars per acre. The instrument taken by the plaintiff from the defendant contemporaneously with the making of the title bond by Becknell to the latter as evidence of the trust does not contain an express affirmative power to sell, but raises the implication that such authority had been conferred. As the defendant was a trustee clothed with the apparent title, a written power was not necessary to the making of a legal conveyance; but the trustee was bound to observe the parol instructions of the beneficiary. And these were that he was to sell only when the land would bring three dollars per acre. Under these instructions, as between himself and the beneficiary in the trust, however it might have been if the question of title had arisen between the plaintiff and an innocent third person who had purchased without notice of the trust or of the instructions under which the trustee acted, the sale was unauthorized and a fraud upon the rights of the plaintiff. And we think it clear that the defendant, the trustee, cannot avail himself of his own breach of trust to acquire the trust property or derive benefits to himself.[15]

[15] It is not enough for the agent to tell the principal that he is personally interested in the purchase. He must tell him every material fact—must make a full disclosure. Dunne v. English, L. R. 18 Eq. 524, 31 L. T. 75 (1874); Murphy v. O'Shea, 2 Jones & La. 422, 8 Irish Law, Rec. 329 (1845); Molony v. Kernan, 2 Dr. & War. 38 (1842).

It matters not that the employment is to sell at a fixed price. The agent must put off the character of agent when he assumes that of the principal. Ruckman v. Bergholz, 37 N. J. Law, 437 (1874). If the agent buys for less than the goods are worth, he is accountable to the principal for the difference. Pierce Co. v. Beers, 190 Mass. 199, 76 N. E. 603 (1906). The interests of the buyer and seller are conflicting, and the law will not allow the agent to act for the seller and at the same time be the buyer. White v. Ward, 26 Ark. 445 (1871). It will not aid that he paid more than any one else would have paid, Pensonneau v. Bleakley, 14 Ill. 15 (1852); and that he bought under cover of the name of a third person, but for more than the property was then worth, Robertson v. Chapman, 152 U. S. 673, 14 Sup. Ct. 741, 38 L. Ed. 592 (1894).

Considering the price actually paid for the land and its value, it is scarcely to be supposed that the defendant could have believed he was acting fairly and honestly towards the plaintiff to suffer the land to be bid off at a price so grossly inadequate; and the reconveyance to himself under the circumstances affords strong reason to conclude that the purchase was collusively made for his benefit. And if the determination of the question submitted to the jury rested on this evidence alone, we should hesitate much to disturb the verdict. But when taken in connection with the admission of the defendant respecting the price at which he was authorized to sell, we think it free from doubt that the verdict was fully warranted by the evidence.

It is suggested in argument that the sum for which the land actually sold was better evidence of its real value than the testimony of the witnesses. We think otherwise. The reduced price at which the sale was made is fully accounted for in the fact that the fairness of the sale was questioned at the time, and that doubtless deterred bidders. The statement of facts, we think, establishes beyond question the land to have been of the value at which it was estimated by the parties and the witnesses. And if it were really of less value, that would not affect the application of the principles on which it must be held that the defendant, acting as the trustee and agent of the plaintiff, did not acquire a title to the property as against the latter. The judgment is affirmed.

FORLAW v. AUGUSTA NAVAL STORES CO.

(Supreme Court of Georgia, 1905. 124 Ga. 261, 52 S. E. 898.)

Petition for the appointment of a receiver to take charge of certain properties, for a reconveyance to petitioners of certain leases, and for a general accounting.

BECK, J.[16] * * * This case is clearly within the fundamental equitable principle laid down in the sixth headnote. It is true that Forlaw was not nominally the agent of the plaintiffs in this case. He was the agent of the Ellis-Young Company, who were the factors of the plaintiffs; but he brought himself within confidential relations of a fiduciary character with Heath and Hogan when he and Young, by advising with the former and suggesting material changes in the terms of the lease which had been contracted for with the Woodward Lumber Company, induced them to waive their (plaintiff's) interest and right in the turpentine privileges in the Cashin mill tract, so that a new lease might be obtained from the lumber company of the turpentine privileges on this valuable tract of land. It is true that Forlaw took the lease from the lumber company to himself individually, but this was under an agreement and understanding between him and the plaintiffs,

[16] Part of the opinion is omitted.

according to which a corporation should be formed and a one-third interest of the stock thereof taken by Heath and Hogan, the Ellis-Young Company furnishing them the money with which to pay for the same. So the new lease of the mill tract, whether Heath and Hogan, or the Ellis-Young Company, or Forlaw were named therein as lessees, was for the benefit of the corporation which was to be created; that is, for the benefit of the incorporators, two of whom were, under the stipulations set forth in the petition, to be these plaintiffs. When Forlaw went to the Woodward Lumber Company to secure the new lease, he went armed with knowledge, with authority, with power he had acquired because of the confidential relations into which he had been brought with the two men who are now seeking equitable relief.

The plaintiffs themselves, through Forlaw, had opened negotiations with the Woodward Lumber Company, which resulted in an agreement being reached whereby the lumber company agreed to sell the entire turpentine privileges on the Cashin mill tract for a fixed sum, waiving its rights to a part of the profits arising from the business which had been stipulated for in the first contract. The lease to Forlaw could not have been obtained but for the agreement and consent of the plaintiffs that it should be made, or that agreement and consent had but for the confidence reposed by the plaintiffs in Young and Forlaw. The latter and certain-named associates, neither of whom were Heath or Hogan, proceeded to secure a charter for a corporation under the name of the "D. J. Forlaw Company," but with the identical object and the same rights, powers, and privileges as had been contemplated for the corporation agreed upon between himself, Young and the plaintiffs. To rule that the Ellis-Young Company was to be permitted to hold the leases assigned to it to the turpentine privileges in the 3,713 acres and the lease to the Cashin mill tract, executed to Forlaw and assigned by him to the Ellis-Young Company, would be a holding at variance with the doctrine established by numerous authorities, and it would be unsupported by any authority to which our attention has been directed.

The safe principle and sound, under the facts of a case like this, seems to be one announced in the American note to Keech v. Sandford, 1 Lead. Cas. Eq. 53, where it was thus forcibly and comprehensibly expressed: "Wherever one person is placed in such relation to another, by the act or consent of that other, or the act of a third person, or of the law, that he becomes interested for him, or interested with him, in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated."[17] And in the case of Conant v. Riseborough, 139 Ill. 391, 28 N. E. 791, it was said: "The principles applicable to the facts of this case are well settled by the authorities. 'If confidence is reposed, it must be faithfully acted upon and preserved from any

[17] The temptation of self-interest is too powerful and insinuating to be trusted; and it must be removed by taking away the right to hold the property purchased. Dennis v. McCagg, 32 Ill. 429 (1863). See, also, note, p. 524.

intermixture of imposition. If influence is acquired, it must be kept free from the taint of selfish interest and cunning and overreaching bargains.' 1 Story's Eq. Jur. § 308. Where a person is intrusted as a confidential agent with the conduct of business where he professes not to act for himself, but for others who have placed their confidence in him, he is disabled in equity, even though he may be a volunteer, from dealing in the matter of his agency on his own account. 'The agency being established, he will be compelled to transfer the benefit of his contract, although he may swear that he purchased on his own account.' Dennis v. McCagg, 32 Ill. 429. The rule applies, not only to persons standing in a direct fiduciary relation towards others, but also to those who occupy any position out of which a similar duty ought, in equity and good morals, to arise. No party can be permitted to purchase an interest when he has a duty to perform which is inconsistent with the character of a purchaser. Davis v. Hamlin, 108 Ill. 39, 48 Am. Rep. 541; Vallette v. Tedens, 122 Ill. 607, 14 N. E. 52, 3 Am. St. Rep. 502." And the facts demanding the application of these rules and principles, the statute of frauds cannot be invoked to prevent it.

If the allegations of the equitable petition in this action are true (and they are to be taken as true as against the demurrer), the Ellis-Young Company, the factors of plaintiffs, stand in a fiduciary relation to them, and, if the fraud and conspiracy alleged can be proved, are trustees ex malificio; and the same is true of Forlaw, in whose name the lease from the Woodward Lumber Company was executed, should the same charges be established by the evidence. In another well-reasoned opinion from the court last quoted, we have the following ruling which strengthens the conclusion we have reached in the case at bar: "Where a confidential agent of one having a lease of a theater, who, from his position, was well acquainted with the profits of his principal in the use of the building, and who knew, some months before the old lease expired, that the latter was desirous of renewing his lease, offered privately to lease the theater of the owner, proposing to give a larger rental than was reserved in the old lease, and denied to his principal that he was competing with him for the lease, but in fact did procure a lease to be made to himself, it was held, that the benefit of such lease a court of equity would hold to inure to his principal, and that the agent would be held to hold the same as trustee for his principal." Davis v. Hamlin, cited supra.

It was contended by counsel for the losing party in that case that the rule which the court applied, which holds an agent to be a trustee for his principal, had no particular application to the case, because Davis, the agent, was not an agent to obtain a renewal of the lease, and was not charged with any duty in regard thereto; that his was but the specific employment to engage amusements for the theater, and that he was only an agent within the scope of that employment; that Hamlin, having a lease which would expire on a certain date, had no right or interest in the property thereafter, and that Davis "in negotiating

for the lease did not deal with any property wherein he had an interest, and that the leased property was not the subject-matter of any trust between them." It was further argued that the relation there between Hamlin and Davis was only one of master and servant or of employer and employé, and that the rule had never been applied to that relation as a class, "that the classes coming within that doctrine are embraced within the list of defined confidential relations, such as trustees and beneficiary, guardian, and ward, etc." But the court replied that the subject was not comprehended within any such narrowness of view, but that in applying the rule, it is the nature of the relation which is to be regarded, and not the designation of the man filling the relation. Or, as clearly expressed in an elementary work on Equity, "The rule under discussion applies not only to persons standing in a direct fiduciary relation towards others, such as trustees, executors, attorneys, and agents, but also to those who occupy every position out of which a similar duty, in equity and good morals, ought to arise." [18] Bishop, Eq. § 93. See, also, Fricker v. Americus Mfg. Co., 124 Ga. 165, 52 S. E. 65.

And we have no hesitancy in affirming the judgment overruling the demurrers of Forlaw and the Ellis-Young Company. * * * Judgment in each case affirmed. All the Justices concurring.

[18] The disability extends to any clerks or agents of the agent. To hold otherwise would be to open the doors to evasion and nullification of the rule. Gardner v. Ogden, 22 N. Y. 350, 78 Am. Dec. 192 (1860); Burke v. Bours, 92 Cal. 108, 28 Pac. 57 (1891). On second appeal, see 98 Cal. 171, 32 Pac. 980, post, p. 539 (1893). Also to any partnership or corporation in which the agent is a party. Bedford Coal Co. v. Parke County Coal Co., 44 Ind. App. 390, 89 N. E. 412 (1909).

If the agent sells to himself and resells at a profit he must account to the principal for this profit. McNutt v. Dix, 83 Mich. 328, 47 N. W. 212, 10 L. R. A. 660 (1890). A sale by the agent to himself is not void, but voidable at the option of the principal, and if he does not dissent no one else can object. If he ratifies the sale, it is valid even as to him. Eastern Bank v. Taylor, 41 Ala. 93 (1867). If he does not, he may treat the agent as holding in trust for his principal. Krutz v. Fisher, 8 Kan. 90 (1871), in which the agent bought his principal's lands at a tax sale. The mere fact that the principal has failed to put the agent in funds to pay the taxes will not justify the agent in procuring and holding the tax title. Bowman v. Officer, 53 Iowa, 640, 6 N. W. 28 (1880). The agent may retain the amount paid for taxes and other proper expenditures, but beyond this he holds for the principal. Barton v. Moss, 32 Ill. 55 (1863). The agent is equally incapacitated to become a purchaser of his principal's property at a mortgage sale. Adams v. Sayre, 70 Ala. 318 (1881); Kimball v. Ranney, 122 Mich. 160, 80 N. W. 992, 46 L. R. A. 403, 80 Am. St. Rep. 548 (1899), containing a review of the cases.

GOWER v. ANDREW.

(Supreme Court of California, 1881. 59 Cal. 119, 43 Am. Rep. 242.)

Action to compel transfer of a lease, and application for injunction pendente lite to restrain defendants from proceeding to recover the premises.

MYRICK, J. This is an appeal from an order refusing to grant an injunction. The facts as presented by the pleadings and affidavits are substantially as follows:

The plaintiffs were warehousemen, and as such occupied certain premises as tenants of the defendant Hopkins. The defendant Andrew was their clerk or agent in and about the business, and had access to their books and papers, and knowledge of the business and their customers. The lease under which plaintiffs held the premises, at a monthly rental of $400, was about to expire, viz., on the 1st of November, 1879. During some month or two prior to the expiration of the lease, plaintiffs were negotiating with Hopkins for a renewal of the lease at a reduced rental, but their minds had not met as to whether there would be a renewal. During the same time the defendant Andrew was, without the knowledge of plaintiffs, negotiating with Hopkins for a lease of the premises to himself and the defendant Ross. During such negotiations, defendant Andrew, without authority from plaintiffs, told Hopkins that plaintiffs would probably give up the warehouse, and if so he would take it at $450 per month. Hopkins, without receiving definite information from plaintiffs that they intended to surrender the premises, but believing that such would be the case, gave to the defendants, Andrew and Ross, a lease of the premises for four years from November 1st, 1879, at a monthly rental of $450. Andrew's object in obtaining the lease was to enter into the business of warehousing with Ross on their own account; and Andrew solicited from some of the customers of plaintiffs at the warehouse their storage business, stating that "he had become the lessee of the warehouse because Gower & Gilman did not want it any longer." During all this time Andrew was in the employ of plaintiffs. As soon, however, as they learned that he had taken the lease he was dismissed.

We think the injunction should have been granted. The granting or refusing to grant an injunction is very much within the discretion of the court to which the application is made; and an appellate court will not interfere unless a right clearly appears to exist. We think, however, that the facts before us clearly show a case where plaintiffs if they shall finally substantiate those facts, will be entitled to relief. We understand it to be the duty of the employé to devote his entire acts, so far as his acts may affect the business of his employer, to the interest and service of the employer; that he can engage in no business detrimental to the business of the employer; and that he should in no case be permitted to do for his own benefit that which would have the

effect of destroying the business to sustain and carry on which his services have been secured. An agent should not, any more than a trustee, adopt a course that will operate as an inducement to postpone the principal's interest to his own. An agent or sub-agent who uses the information he has obtained in the course of his agency as a means of buying for himself, will be compelled to convey to the principal. Elliott v. Merryman, 1 Lead. Cas. Eq. 91.

It may be said that Andrew was not the agent of plaintiffs so far as concerns the obtaining of a renewal of the lease; that he was not charged with the duty of obtaining a renewal; it must, however, be said that he was, by virtue of his employment, charged with the duty of furthering their interest, and with the duty of not using the information obtained by him as their employé to their detriment. It seems to us that if Andrew desired to engage in the same business as his employers, on his own account, a very plain and very proper course was open to him, viz., to state to them all the facts, and ask them to determine whether they desired a renewal. By pursuing the course which he did, he gave to Hopkins an inducement not only not to give plaintiffs a renewal at a decreased rental, but also an inducement not to renew at the then rental; and he compelled plaintiffs to have an unknown competitor who based his action upon knowledge acquired by him while in their employ. We do not think that this is equity or good conscience.

The order refusing the injunction is reversed.[19]

VAN DUSEN v. BIGELOW.

(Supreme Court of North Dakota, 1904. 13 N. D. 277, 100 N. W. 723, 67 L. R. A. 288.)

MORGAN, J.[20] This equitable action is brought for a reconveyance of certain real estate which was conveyed to the defendant by the plaintiff while defendant is alleged to have been plaintiff's agent for the sale of such real estate and failed to communicate to plaintiff that he had received an offer for said land for a much larger sum than that for which the plaintiff sold the same to the defendant. The substance of the allegations of the complaint is that defendant took advantage of the confidence reposed in him by plaintiff as her agent and purchased the land himself, under fraudulent concealment of facts, for a sum much less than that which he could have sold it for, and much less than the actual value of the land. In the complaint plaintiff offers to return all money and the security received by her from the defendant under such conveyance. The defendant by answer denies that he was plaintiff's agent for the sale of such land, and denies that he was

[19] The dissenting opinion of Thornton, J., is omitted.

[20] Part of the opinion is omitted.

offered a larger sum for such land than he paid for it, and denies that he fraudulently concealed any facts from plaintiff, and denies that the land was worth any more than he paid for the same. Whether defendant was plaintiff's agent for the sale of her lands, and whether defendant had an offer for the land of $1,400 when he purchased it for himself for $900, were the issues that were contested at the trial. The trial court found against the defendant on both these issues, and ordered that a reconveyance be made upon restoration by plaintiff of all that she had received under the sale. The defendant appeals from a judgment rendered on such findings, and requests a review of the entire record under section 5630, Rev. Codes 1899. * * *

That he was in correspondence with her about the sale and value of this land, and advised her concerning the same, is undisputed, and is shown by his own letters outside of Exhibit A. That he was her sole agent to care for her other property is also beyond dispute. That he alone looked after all her interests in Jamestown and vicinity is also beyond question. Defendant was her agent as to certain matters, and as to those matters he had her confidence, and as to those matters she relied on his judgment. Whether he was her authorized agent to sell the land—that is, whether he was such agent in respect to the sale of the land that his contract for the sale of the land would bind her—need not be determined. We think that he was her agent in respect to the land, and, as such agent, he was under obligations to advise her fully as to all facts within his knowledge bearing upon the value of the land, and upon all matters in reference to the sale thereof. Defendant had been her agent for several years. We think the evidence in the record, outside of Exhibit A, is sufficient to show that he was her agent to sell this land. That such agency to sell the land is not shown by explicit writing is entirely immaterial in this kind of action. It is not a case of enforcing a contract against a principal made by an agent with a third person.

In a case like the one at bar the agency may be shown by parol, as there is no statutory provision that requires an agency to negotiate for a sale to be in writing. It is the confidential relation existing between them, followed by concealment of facts, that is the gist of the cause of action. He was her agent for specific purposes connected with this land and with her other property. By virtue of such agency he became acquainted with the value of the land, and knew that she knew nothing of its value, and that she was relying wholly upon him. It is the existence of such confidence, arising out of their business relations as to a specific agency, that gives rise to a duty on his part to disclose all facts known to him in reference to the value of the land if he chose to buy it himself. It is not claimed that he made false or fraudulent statements. It is claimed that he should have disclosed that he had an offer of $1,400 for the land when he bought it for $900, and that this was a fraudulent concealment. The relations existing between them, as shown by the evidence referred to, was such as demanded frank

and full disclosures of all facts known to him bearing on the value of the land before he could become a purchaser of the same, although avowedly made for himself.

In Norris v. Tayloe, 49 Ill. 17, 95 Am. Dec. 568, it was said: "Where a party accepts the position of an agent to take charge of the lands of his principal, collect the rents and royalty, and pay taxes, a fiduciary and confidential relation is thereby created in regard to everything relating to such lands, and in treating with his principal for the property the agent is bound to make the fullest disclosures of all matters connected therewith, within his knowledge, which it is important for his principal to know in order to treat understandingly."

In Davis v. Hamlin, 108 Ill. 39, 48 Am. Rep. 541, it was said: "It is contended by appellant's counsel that the rule we apply, which holds an agent to be a trustee for his principal, has no application to the case at bar, because Davis was not an agent to obtain a renewal of the lease. and was not charged with any duty in regard thereto; that his was but a specific employment to engage amusements for the theater, and that he was agent only within the scope of that employment; that Hamlin, having a lease which would expire April 16, 1883, had no right or interest in the property thereafter; and that Davis, in negotiating the lease, did not deal with any property wherein Hamlin had any interest, and that such property was not the subject-matter of any trust between them. Although there was no right of renewal of the lease in the tenant, he had a reasonable expectation of its renewal which courts of equity have recognized as an interest of value, secretly to interfere with which and disappoint, by an agent in the management of the lessee's business, we regard as inconsistent with the fidelity which the agent owes to the business of his principal. * * * In applying the rule, it is the nature of the relation which is to be regarded, and not the designation of the one filling the relation."

In Cook v. Berlin Woolen Mills Co., 43 Wis. 433, the court said: "But whatever may be the nature of the agency, a court of equity regards every purchase by an agent from his principal with jealous scrutiny, to see that the agent takes no advantage from the confidence of his principal; with jealousy almost invincible, as Judge Story calls it; and there is a class of agents who are held to a very strict rule, a good deal like the rule which courts of equity once generally applied to trustees, and some few courts still apply. When the nature of the agency has given the agent control in the management of the principal's property, and peculiar opportunity of knowing its condition and value, a purchase of it by the agent will be avoided at the suit of the principal, unless the agent make it affirmatively appear that the transaction was fair, and that he imparted to the principal all his information concerning the property, and acted throughout uberrima fide."

Pomeroy on Equity Jurisprudence (volume 2, § 959) lays down the rule as follows: "Any unfairness, any underhanded dealing, any use of knowledge not communicated to the principal, any lack of the perfect

good faith which equity requires, renders the transaction voidable, so that it will be set aside at the option of the principal. If, on the other hand, the agent imparted all his own knowledge concerning the matter, and advised his principal with candor and disinterestedness as though he himself were a stranger to the bargain, and paid a fair price, and the principal on his side acted with full knowledge of the subject-matter of the transaction and of the person with whom he was dealing, and gave a full and free consent—if all these are affirmatively proved, the presumption is overcome and the transaction is valid."

See, also, Ingle v. Hartman, 37 Iowa, 274; Rubidoex v. Parks, 48 Cal. 215; Cottom v. Holliday, 59 Ill. 176; Jackson v. Pleasonton, 95 Va. 654, 29 S. E. 680; Andrews' Am. Law, p. 813, and cases cited; Mechem on Agency, § 466, and cases cited; 1 Am. & Eng. Enc. of Law, p. 1081, and cases cited; Wharton on Agency, § 235, and cases cited; Ruckman v. Bergholz, 37 N. J. Law, 437; Jansen v. Williams, 36 Neb. 869, 55 N. W. 279, 20 L. R. A. 207; Casey v. Casey, 14 Ill. 112; Stewart v. Gilruth, 8 S. D. 181, 65 N. W. 1065.

A duty of full disclosure of all material facts within his knowledge bearing on the value of the land rested upon the defendant, and, unless he made such disclosures before himself becoming a purchaser, the conveyance becomes voidable upon plaintiff's election to so consider it. * * *

The judgment is therefore affirmed. All concur.

BURKE v. BOURS.

(Supreme Court of California, 1893. 98 Cal. 171, 32 Pac. 980.)

HARRISON, J.[21] When this action was here upon the last appeal (92 Cal. 108, 28 Pac. 57) the facts before the court were that Bours had been employed by Faulkner, Bell & Co., who were agents of Arguello, to make a sale of the land, and had reported to them a sale thereof for the sum of $4,500, sending at the same time a form of a deed to be executed by Arguello, without, however, inserting the amount of the consideration or the name of the grantee; that Arguello filled in the amount of the consideration, and executed the deed without inserting the name of any grantee; that when Bours received the deed he caused his own name to be inserted therein as grantee, and sent his check for the amount of the purchase money to Faulkner, Bell & Co., who accounted for the same to Arguello. The judgment of the court below was reversed upon the grounds that Bours was to be regarded as the agent of Arguello for making a sale of the land, and could not, as such agent make a sale to himself. * * * The conditions under which the judgment of this court was then rendered do not now exist. It now appears not only that Bours

[21] Part of the opinion is omitted.

dealt openly with Arguello in the sale, and that the transaction was fair and just, and the consideration full and adequate, but it also appears that "the sale was made with the full knowledge and consent of Arguello." These circumstances take the case out of the principles announced at the former hearing, and show a complete defense to a recovery by the plaintiffs. There is no inhibition upon a purchase by an agent from his principal, "where the facts are fully disclosed, and the agent acts in good faith, taking no advantage of his situation. The principal may, if he sees fit, deal with the agent as with any other person." Mechem, Ag. § 466; Rochester v. Levering, 104 Ind. 562, 4 N. E. 203. The agent has the same right to deal directly with his principal as has a stranger. The rule which prevents the agent from purchasing the property which he is authorized to sell for his principal is based upon the maxim that no man can serve two masters, and that an agent shall not unite in his own person his individual with his representative character, or place himself in a position where his personal interest will be in conflict with his duty to his principal. When, however, the agent deals with his principal "at arm's length, and after a full disclosure of all that he knows with respect to the property" (Murphy v. O'Shea, 2 Jones & La. T. 425), or when the principal ratifies the purchase from himself with full knowledge of the circumstances connected with the transaction, he can thereafter avoid the sale only upon the same grounds as if the purchase had been made by a stranger. The powers of an agent in dealing with the property of his principal are limited in the same manner as those of a trustee. A trustee is not forbidden to deal with the trust property when the beneficiary, with a full knowledge of the motives of the trustee and of all other facts concerning the transaction which might affect his own decision, and without the use of any influence on the part of the trustee, permits him to do so. Civil Code, § 2230.

The present case does not fall within the rule which is applicable when an agent with a power of sale makes a sale to himself. Bours did not have any power of sale from Arguello, and did not in fact make any sale to himself. His relation to Arguella, resulting from his original employment by Faulkner, Bell & Co., was rather that of a broker than an agent for sale, and his subsequent proposition to them that he would himself purchase the land from Arguello at the price of $4,500 placed him in the position of a purchaser dealing directly with the owner. Faulkner, Bell & Co. were the agents of Arguello for the sale of the property, and the persons to whom Bours, if he desired to purchase the same, would naturally make application. He had had no direct correspondence with Arguello, and his offer and information to Faulkner, Bell & Co. must be regarded the same as if made to Arguello. Although his previous relation to Arguello, by virtue of having been employed to make a sale of

the property, still left him charged with the duty of disclosing any facts or circumstances affecting the property which might have come to his knowledge while holding such fiduciary relation, yet the record does not show that there was any concealment or silence on his part which would make him guilty of constructive fraud.

When Bours wrote to Faulkner, Bell & Co., making the proposition to purchase the property himself from Arguello for the sum of $4,500 he was not acting as the agent of Arguello in making a sale of the premises to himself, but was making a direct proposition to Arguello through Faulkner, Bell & Co., who were his agents for the sale of the property. Arguello had been previously informed of all that Bours had done in attempting to effect the sale, and it is not disputed that $4,500 was the full value of the property. The court finds that, when Bours was first employed in behalf of Arguello, he wrote to Faulkner, Bell & Co., "fully advising them of the condition of the said property;" and that, after the receipt of that letter, Arguello stated "that he agreed with Mr. Bours' opinion of the property;" and that, after Bours had endeavored to make a sale of the property, he again wrote to Faulkner, Bell & Co., "advising them therein of what he had done;" and that, as soon as he had found a purchaser, he informed Faulkner, Bell & Co. thereof. These findings are not excepted to, and, as it is not claimed that there were any facts or circumstances within the knowledge of Bours that he failed to disclose, must be construed as equivalent to a finding that he made a full disclosure of all the information he had respecting the value or condition of the property.

As the sale from Arguello to Bours is to be regarded as made upon a direct dealing between them for the purchase and sale of the property, the rules governing the ratification and confirmation by a principal of the act of his agent have no application. The judgment is affirmed.

DENNISON v. ALDRICH.

(Kansas City Court of Appeals, Missouri, 1905. 114 Mo. App. 700, 91 S. W. 1024.)

JOHNSON, J.[22] Plaintiffs sued defendant as their agent to recover the sum of $4,000, received by the latter as a commission for the sale of some mining property in Jasper county. It is claimed defendant obtained the money as the fiduciary of plaintiffs, and then repudiated his obligation to them to account for it. The trial resulted in a judgment for defendant. A motion for a new trial was filed by plaintiffs, and upon hearing, sustained by the trial judge, who assigned the following reasons for his action: "That the court erred in giving instructions for defendant, and in refusing instructions

[22] Part of the opinion is omitted.

asked for by plaintiffs, in modifying instructions asked by plaintiffs, and giving instructions on the court's own motion, and because the court erred in admitting incompetent and irrelevant evidence on the part of defendant, and rejected competent and legal evidence offered by plaintiffs." Defendant, after unsuccessfully moving for an order to set aside that sustaining the motion for a new trial, brought the case here upon appeal. * * *

The instructions given by the court evidently are based upon a misconception of the principles controlling the relation of principal and agent. In effect, the jury was told that defendant during the continuance of plaintiffs' right to sell the property under their contract with the owners, could, by the termination of his employment under plaintiffs, absolve himself from all duty to them, and, by making an independent contract with the owners, enter into competition with them for the sale of the property. The relation of principal and agent is one of trust and confidence analogous to that of trustee and cestui que trust, client and attorney, and employer and employé. A person acting in a fiduciary capacity is not permitted to use the information or advantage gained through his position for his own benefit and against the interest of his correlate. He must be faithful to his trust and to guard against faithlessness is not allowed to intermeddle on his own account with the subject of his employment so long as the one for whom he is employed to act has any right or interest in the matter. If he does interfere, the fact of the prior termination of his employment will not release him from accountability. His trusteeship cannot thus be cast off. If defendant accepted employment from plaintiffs to aid them in selling the property he should have done nothing at any time to disturb their relations with their principals, and he could not accept employment from the owners for himself until after plaintiffs' employment was finally ended.

It is not indispensable to plaintiffs' right to recover that the continuation of their employment to the date of the sale of the property be found. If it existed at the time defendant began to negotiate the contract with the owners for himself, which he succeeded in procuring on June 27th, plaintiffs should recover. In such case defendant's bad faith in undermining his principals would bind him to them and give to them the fruits of his faithless acts. Trice v. Comstock, 121 Fed. 620, 57 C. C. A. 646, 61 L. R. A. 176; Paul v. Machine Company, 87 Mo. App. 647; Eoff v. Irvine, 108 Mo. 378, 18 S. W. 907, 32 Am. St. Rep. 609; Life Ins. Co. v. Smith, 117 Mo. 261, 22 S. W. 623, 38 Am. St. Rep. 656; Mechem on Agency, §§ 455, 456; 2 Sugden on Vendors, 406 et seq.; Grumley v. Webb, 44 Mo. 444, 100 Am. Dec. 304.

On the other hand, if, as defendant contends, the relation of plaintiffs to the owners was finally ended on June 15th, and until after that date he made no effort to seek employment direct from the own-

ers, nor gave willing ear to proposals from McDonald, then in such case plaintiffs would have no cause of action. While as stated, good faith requires a fiduciary to serve alone the interest of his correlate in the subject of the employment, the termination of such interest ends all duty, and leaves him free to serve himself or others, provided he has done nothing during the continuance of such interest to lay the foundation for future advantage to himself at the expense of his principal's rights. Halperin v. Callender, 17 Misc. Rep. 362, 39 N. Y. Supp. 1044; La Force v. Washington University, 106 Mo. App. 517, 81 S. W. 209; Beauchamp v. Higgins, 20 Mo. App. 514.[28] * * *

The errors noted justified the sustaining of a motion for a new trial, and the order is affirmed. All concur.

[28] Accord: New Era Co. v. Shannon, 44 Ill. App. 477 (1892), in which the agent resigned in order to take advantage of his principal. The purchase by a fiduciary of a trust property will always be scanned by a court of equity with the most searching and questioning suspicion. Newcomb v. Brooks, 16 W. Va. 32 (1879). The burden of establishing the utmost good faith is on the agent. Condit v. Blackwell, 22 N. J. Eq. 481 (1858). The necessity of the rule is made clear in Cook v. Berlin Woolen Mills Co., 56 Wis. 643, 14 N. W. 808 (1883): "Such an agent, contemplating a purchase of the subject of his agency, has dangerous power to confuse its condition and make it appear worth less than it is. Such an agent might well be tempted, would generally have some power, so to shape his agency, as not only to depreciate in apparent value, but temporarily in real value, what he designs to purchase. This is not said by way of comment on the facts here. There is nothing in the record to raise any presumption of such fraud against the superintendent. It is said by way of illustrating the justice and wisdom of the rule applicable to purchases by such agents generally. And the respondents, to support the purchase of the superintendent, took upon them the onus probandi that he had not abused his power; that he practiced throughout positive and explicit frankness and impartiality; had imparted to his principals all his own information bearing on the value of the property; had given all the advice against himself that he should have given against a stranger; had derived no advantage from his agency, but had acted openly throughout, uberrima fide." If he has kept back any information that might have affected the action of the principal, the transaction may be set aside. Prince v. Dupuy, 163 Ill. 417, 45 N. E. 298 (1896). But when the agent can establish his integrity, fidelity and fair and open dealing with the principal, even a gift from the principal may be upheld. There is no reason why a principal may not in this way express his gratitude to his agent and his appreciation of his services. Ralston v. Turpin, 129 U. S. 663, 9 Sup. Ct. 420, 32 L. Ed. 747 (1889), affirming (C. C.) 25 Fed. 7 (1885). And a lease to the agent is subject to the same principles. Lord Selsey v. Rhoades, 2 Sim. & St. 41, 1 Bligh, 1 (1824).

BARTHOLEMEW v. LEECH.

(Supreme Court of Pennsylvania, 1838. 7 Watts, 472.)

Ejectment. Defendant claimed under a tax deed to his father, John Leech.

GIBSON, C. J.[24] It is not denied that the defendant's father had been the plaintiff's agent and curator of the land. The father himself testified that his agency had expired before the sale; but that is not enough. To capacitate him as a purchaser on his own account, he must have explicitly resigned his trust. The most open, ingenuous and disinterested dealing is required of a confidential agent while he consents to act as such, and there must be an unambiguous relinquishment of his agency before he can acquire a personal interest in the subject of it. To leave a doubt of his position in this respect, is to turn himself into a trustee. It is unnecessary to recur to authority for a principle so familiar or so accordant with common honesty.[25] The agent was employed, in this instance, expressly to preserve the land from being sold; and taking his agency to have been left unclosed by the absence of an explicit renunciation of it, neither Leisenring v. Black, 5 Watts, 303, 30 Am. Dec. 322, nor Riddle v. Murphy, 7 Serg. & R. 230, presented a stronger case to restrain the agent from purchasing for himself. Within the three preceding years, he had been reimbursed his expenses and paid for his services; but that was not a dissolution of the previous relation, and it is not pretended that there was any other evidence of it. On the contrary, the fact that he gave intelligence of the sale to a cotenant of the plaintiff, as well as to a friend of the family, evinces a consciousness that his duties as a fiduciary were not entirely closed. He is therefore to be treated as having been a trustee. But did the defendant purchase of him with notice? Knowing, as he probably did, of the former existence of the agency, he would be bound to inquire into the duration of it, and he would stand affected by it. * * *

Judgment reversed and venire de novo awarded.

[24] Part of the opinion is omitted.

[25] Accord: Barton v. Moss, 32 Ill. 50 (1863). An agent who has sold property for his principal is not thereby incapacitated to buy of the vendee, if it appears that he sold in good faith, and not under mere color of a sale, to a third person, with an understanding that it would later be turned over to the agent. Robertson v. Chapman, 152 U. S. 673, 14 Sup. Ct. 741, 38 L. Ed. 592 (1894). A mere formal surrender of the agency is not enough, particularly if it was made merely to enable the agent to acquire an interest in the principal's property. Fountain Coal Co. v. Phelps, 95 Ind. 271 (1884); Bowman v. Officer, 53 Iowa, 640, 6 N. W. 28 (1880), in which the agent had not been put in funds to pay the taxes, and later bought a tax title; New Era Co. v. Shannon, 44 Ill. App. 477 (1892). However, when the agency has really ceased, the disability no longer exists, McKinley v. Irvine, 13 Ala. 681 (1848), though even then the agent cannot be permitted for his own advantage to undo, so far as he can, the business he has done for his principal, Merchants' Ins. Co. v. Prince, 50 Minn. 53, 52 N. W. 131, 36 Am. St. Rep. 626 (1892).

SPALDING v. MATTINGLY.[26]

(Court of Appeals of Kentucky, 1889. 89 Ky. 88, 1 S. W. 488, 8 Ky. Law Rep. 343, 12 Ky. Law Rep. 243.)

B. F. Mattingly was surety on notes given by Spalding and Geo. Mattingly to purchase cattle to feed. To protect him, they gave B. F. Mattingly a bill of sale of said cattle, and a power to sell them to satisfy the notes. They had hired one B. S. Mattingly to feed the cattle for them, but failed to perform their agreement to erect feeding pens and furnish straw and hay, whereupon B. F. Mattingly sold the cattle to B. S. Mattingly. Spalding petitions in equity for relief and appeals from judgment for Mattingly.

BENNETT, J.[27] * * * The contention of appellant that appellee B. S. Mattingly is liable to him for the value of said cattle at selling time, and also for the slops, less his expenses (although appellee B. F. Mattingly may not be liable), because at the time he purchased the cattle from B. F. Mattingly he was acting as appellant's agent in slopping and attending to said cattle, cannot be sustained, for the reason that the equitable rule which prevents an agent from dealing with his principal's property for his own benefit, inconsistent with the interest of that of the principal, "applies only to agents who are relied upon for counsel and direction, and whose employment is rather a trust than a service, or both, and not to those who are employed merely as instruments in the performance of an appointed service,"—such as an employé to render manual labor for the principal, without any trust power being delegated to him, to act on behalf of the principal, but only to render some appointed labor for him, for wages—then the employé may purchase the principal's property as well as any one not so situated. It would not be contended that a person merely employed by the owner of a team of horses to feed and drive them could not purchase them from any other person authorized to sell them. Here, appellee B. S. Mattingly was only employed to straw, slop, and attend to said cattle at an agreed price; and appellee B. F. Mattingly, having the right under the circumstances to sell them, B. S. Mattingly was under no equitable obligation not to buy them for himself, upon fair terms.

After carefully considering the whole case, we are of the opinion that there is no reversible error in the proceedings in the court below. The judgment is affirmed.

[26] Accord: Curlett v. Newman, 30 W. Va. 182, 3 S. E. 578 (1887), in which the court found the relations were not confidential.

[27] Part of the opinion is omitted.

SECTION 2.—OBEDIENCE

WILSON v. WILSON.

(Supreme Court of Pennsylvania, 1856. 26 Pa. 393.)

Assumpsit by Thomas Wilson against Matthew C. Wilson for money which defendant had received for plaintiff. Plaintiff wrote him: "I don't say I must have it, but I would like to have at least $250 as soon as you can send it, or $300 would not come amiss. You can send inclosed in a letter in $50's or $100 notes on par banks. * * * Only be careful to send it folded up and sealed." Defendant sent 18 bills of the denomination of $5, $10, and $20, and $100 in a letter carefully folded and sealed. The letter never was received.

LEWIS, C. J. The primary obligation of an agent, whose authority is limited by instructions, is to adhere faithfully to those instructions, in all cases to which they ought properly to apply. Story on Agency, § 192. He is in general bound to obey the orders of his principal exactly, if they be imperative and not discretionary; and, in order to make it the duty of a factor to obey an order, it is not necessary that it should be given in the form of a command. The expression of a wish by the consignor may fairly be presumed to be an order. Story on Contracts, § 359; Brown v. McGran, 14 Pet. 494, 10 L. Ed. 550. It is true that instructions may be disregarded in cases of extreme necessity arising from unforeseen emergencies, or if performance becomes impossible, or if they require a breach of law or morals. Story on Agency, § 194. These are, however, exceptional cases. There may, perhaps, be others which have been sanctioned by adjudications, founded on the principle that the departure complained of was not material. But the general rule is as indicated in what has been said, and the case before the court is not brought within any of the exceptions.

To justify a departure from instructions, where a loss has resulted from such deviation, the case must be brought within some of the recognized exceptions.[28] It is not sufficient that the deviation was

[28] Rechtscherd v. Accommodation Bank, 47 Mo. 181 (1870), in which the agent "intended to act for the benefit of the principal." So long as an agent is held to a strict compliance with an order plainly expressed the principal can never complain, nor the agent suffer, be the consequences to the former what they may. Courcier v. Ritter, Fed. Cas. No. 3,282, 4 Wash. C. C. 549 (1825); Pariente v. Lubbock, 20 Beav. 588, 8 De G. M. & G. 5 (1855). The presumption is that the principal knows his own interests and objects better than does the agent. Hinton v. Ring, 111 Ill. App. 369 (1903); Hays v. Stone, 7 Hill, 128 (1845), in which it is said to be the first and highest duty of an agent to adhere faithfully to the orders of his principal; and devia-

not material if it appear that the party giving the instructions regarded them as material, unless it be shown affirmatively that the deviation in no manner contributed to the loss. This may be a difficult task, in a case like the present; but the defendant voluntarily assumed it when he substituted his own plan for that prescribed by the plaintiff. To force a man to perform an executory contract, after substituting for the consideration other terms than those provided for in the bargain, is to deprive him of the right to manage his own business in his own way. To do this on the ground that the departure is not material, when it is manifest that the party considered it otherwise, is a violation of private right, which leads to uncertainty and litigation without necessity or excuse. In Nesbit v. Burry, 25 Pa. 210, this court refused to compel a man to give up his oxen although he had sold them and received part of the purchase-money, because it was a part of the contract that they were sold by weight, and the weight was to be ascertained by "the scales at Mount Jackson." The scales designated were so out of repair that the weight could not be ascertained by them, and it was held that no others could be substituted against his consent so as to divest his right of property.

Whether an action for damages could have been sustained was not the question there; nor is it the question here. As between vendor and vendee, the right of property and the consequent risk vests on delivery of the goods purchased to the designated carrier, packed, and directed according to usage or instructions. But if a different method of packing and directing, or a different carrier than the one designated, be adopted by the vendor, he assumes the risk in case of loss, unless it be shown that his deviation in no way contributed to the loss. Where the goods are stolen, how can this be shown? In sending bank-notes by mail, it is manifest that while a large package would attract the attention and care of honest agents on the route, it might tempt the cupidity of dishonest ones. The party who proposes to take the risk of this method of remittance has a right to weigh the advantages and disadvantages of the various methods of enclosing the notes; and if he directs the money to be remitted in notes of $100 or $50, the debtor has no right to increase the size of the package by remitting in notes of $10 and $5. There was error in permitting the jury to find that the departure from instructions was immaterial.

Judgment reversed and venire de novo awarded.

tion will make him responsible for the consequences. The law will not permit the agent to violate his instructions with impunity, or to use the property of his principal in any manner for his own profit. The case was affirmed in 3 Denio, 575 (1846).

As to ratification of the disobedience, see Walker v. Walker, 5 Heisk. 425 (1871).

HALL v. STORRS.

(Supreme Court of Wisconsin, 1858. 7 Wis. 253.)

COLE, J.[29] This cause was tried before the county court of Milwaukee county, without a jury, and a judgment was rendered for the respondents. The counsel for the respective parties have admitted by stipulation that the following facts were found by the county court:

1. "That the respondents resided in Whitewater, and did business at that point, and that the appellants were factors and commission merchants in the city of Milwaukee."

2. "That the respondents on the 15th day of May, 1857, shipped a quantity of wheat consigned to the appellants, that the appellants received the wheat on the same day and sold it to Montgomery & Cutler, and took in payment therefor, the check of Montgomery & Cutler, dated on the 16th day of May, 1857, one day after the sale. And that on the evening of the same day, the appellants forwarded to the respondents a statement of the amount of the sales, less their charges and commissions, and forwarded in the same letter the amount of said sale less their commissions and charges."

3. "That the check of Montgomery & Cutler was presented on the day it bore date, to wit: on the 16th, and payment was refused, and that Montgomery & Cutler on that day were insolvent, and that the check has not been paid."

4. "That by the usual course of business in Milwaukee, commission merchants collected cash sales on the day after delivery."

5. "That on the 16th day of May, the respondents shipped another quantity of wheat to the appellants, which they received and sold for cash, and returned to the respondents a statement of the sales, and it is for the last sale that the suit is brought."

6. "That up to the 16th of May, Montgomery & Cutler were in good credit."

The appellants admit in their answer that the wheat was consigned to them by the respondents to be sold for cash.

Upon this state of facts the question arises, who is to sustain the loss of the Montgomery & Cutler check, the appellants or respondents? We are most clearly of the opinion that it must be the former.

We do not understand the general proposition to be controverted, that it is the first duty of an agent or factor whose authority is limited by instructions, to adhere faithfully to those instructions in all cases to which they properly apply. The express orders of the principal, when they are clear, possible and proper, leave no discretion with the agent, but are absolutely imperative upon him. If a person employs another to act for him in any lawful business, he has an undoubted right to limit and restrict the agent's authority as he thinks proper.

[29] Part of the opinion is omitted.

And if the agent violates his duties and obligations to his principal, whether by exceeding his authority, or positive misconduct, or by negligence or omission in the proper functions of his agency, or in any other manner, and any loss or damage results therefrom to the principal, he is responsible therefor and must make full indemnity.

There are a few exceptioins when an agent is held justified in cases of extreme necessity, arising from unforeseen emergencies in departing from positive instructions. But these exceptions have no application to this case. Here the appellants in effect concede that they received the wheat, and were instructed to sell it for cash. Is there anything ambiguous about such an instruction? In the common, ordinary, popular acceptance of the language, was it not a clear, positive and unqualified direction not to sell or pass title to the wheat without cash in hand? When a country merchant forwards wheat to a factor in Milwaukee, to be sold for cash, does he expect that the grain will become the property of another without the consideration being paid down? A sale then for cash we suppose means that the money shall be paid when the title to the property passes. This is the common, popular sense of the language, and the appellants had no authority except to dispose of the wheat according to the strict orders of their consignors. And if they have assumed the power of departing from the instructions, and a loss has occurred in consequence of it; they must sustain it and not their principals. It appears to us, that to sanction a latitude of action in the factor beyond the rigid commands of the principal would be most mischievous, and unsettle long established principles of law.

But it is said that in the absence of instructions or where the terms of the instructions have a peculiar signification at the market where the article is to be sold, the usual and customary manner of sale is to be the rule for the factor and the consignor and factor are both deemed to have contracted with a view to such custom or usage.[30] This may all be very true, and yet how does the proposition help the appellants' case?

We have already stated that in our judgment there was nothing peculiar or doubtful or ambiguous in the direction given by the respondents to sell the wheat for cash. That in the popular and common sense of the language, such a sale is understood to be one where property is sold for money in hand. And that it is an ingredient or condition of a cash sale that the title to the property does not pass to the purchaser until the purchase money is paid. We are aware that cases can be found which go to establish the doctrine that when a factor has received goods with direction to sell for cash, but which he does not sell for cash, but on short time, according to the usage and custom of the market, it has been held that such a sale was in compliance with the

[30] Usage may govern when the instructions are not clear. Boden v. French, 10 C. B. 886, 70 E. C. L. 886 (1851).

orders of the principal. See Clark v. Van Northwick, 1 Pick. 343. Contra: Catlin v. Smith, 24 Vt. 85; Barksdale v. Brown et al., 1 Nott & McC. 517, 9 Am. Dec. 720; Douglass v. Leland, 1 Wend. 492.

We doubt exceedingly the soundness and correctness of the rule which permits a usage or custom in any particular business or trade to qualify or vary the instructions to an agent, and allow him to show that by the understanding of merchants a sale on credit was no violation of an order to sell for cash. But if it may be shown that terms in any particular business or trade, by usage have acquired a meaning different from their ordinary acceptation, and that by such custom a cash sale does not mean what the language imports, then it is obvious that the evidence of such a custom should be most clear and satisfactory. Now, we do not think the proof in this case would at all warrant us in saying that a local usage existed in Milwaukee so "ancient, uniform, notorious and reasonable" that the respondents and appellants must be presumed to have contracted with reference to it, and that according to this usage a cash sale is when property is sold one day and the purchase money is collected the day after delivery, and we should not be authorized from anything we can see in this case in supposing such a custom to exist.

And manifestly if such a custom does obtain in Milwaukee and the appellants relied upon it to excuse themselves from a seeming violation of orders to sell for cash, then they should have established the custom beyond all reasonable doubt. Since they did not show the existence of such a custom, we must hold them to all the responsibility of violating the instructions of their principals, and they must lose the amount of the check of Montgomery & Cutler, instead of the respondents. * * * Judgment affirmed.

GREENLEAF v. MOODY.

(Supreme Judicial Court of Massachusetts, 1866. 13 Allen, 363.)

FOSTER, J. This case must depend for its decision upon the application of well established legal principles to a state of facts of an unusual and extraordinary character.

The defendants, commission merchants or factors in New Orleans, received during the rebellion in 1864 from the plaintiff a large quantity of hay consigned for sale, upon which they made advances in payment of freight and other charges amounting to about half its value. Three hundred and twenty-one tons of the hay were sold to the military officers of the United States, for cash. The remainder, one hundred and thirty-four tons, were seized by military authority. No fault could be imputed to the factors for either of these events. The sales for cash were clearly within the scope of their authority, and the sei-

zure by the strong arm of military power was an occurrence beyond their control.

The only payment which the United States officers would make, either for the hay purchased or for that seized, was in certificates of indebtedness, the negotiable notes of the United States, payable to the bearer and upon interest at the rate of six per cent. per annum. The factors accepted these as payment, and at once sold them for their market value, ninety-three cents on the dollar. The plaintiff claims that the defendants are liable for the loss sustained by this sale at a discount, first, because as factors they had no right to take in payment such securities; and secondly, because, if justified in accepting them, they had no right to sell them below par without notice to him. And we are called upon to decide whether in either of these particulars they violated their duty, so as to render themselves personally answerable to their principal, the consignor, for the loss sustained by the sale of the certificates at a discount below their face.

The ordinary rule is clear, that factors must obey the instructions of their principal; that they may not compromise debts without authority; that they must, under a change of circumstances, advise the consignor, and await his directions; and that they must conform to the usages of trade presumed to be known to both parties, or to the course pursued by them and approved by the owner in former instances. But what is their duty in novel, critical and unforeseen emergencies?[81] To answer this question we may refer to an opinion of Mr. Justice Story in a suit relative to the conduct of a supercargo who had totally departed from the instructions of the shipper, which is so apposite that we adopt its principles and the substance of its language. In circumstances of necessity or great urgency it is only necessary that the agent should act bona fide and with reasonable discretion. "What, then, was it the duty of the supercargo to do in such a case of unexpected occurrence, not within the contemplation of the instructions?" "Now I take it to be clear that if, by some sudden emergency, or supervening necessity, or other unexpected event, it becomes impossible for the supercargo to comply with the exact terms of his instructions, or a literal compliance therewith would frustrate the objects of the owner and sacrifice his interests, it becomes the duty of the supercargo, under such circumstances, to do the best he can, in the exercise of a sound discretion." "He becomes, in such a case, an agent from necessity for the owner." "In all voyages of this sort there is an implied authority to act for the interest and benefit of the owner in all cases of unforeseen necessity and emergency, created by operation and intendment of law." Forrestier v. Bordman, 1 Story, 43, 51, Fed. Cas. No. 4,945.

A justification founded upon necessary departure from the ordinary customs of trade or from actual instructions must undoubtedly be con-

[81] See Foster v. Smith, 2 Cold. 474, 88 Am. Dec. 604 (1865), holding that the sinking of a boat laden with grain did not justify the agent in selling the grain, though it was his duty to try to save it from destruction.

strued with considerable strictness. The agent cannot be allowed lightly or unadvisedly to assume a latitude of discretion not conferred upon him by express authority, or by those usages of trade, which both parties are presumed to have known and contemplated. But the interests of commerce require, and the enlightened principles of commercial law bestow, a discretion which enables the factor to protect his principal from the irreparable injury which would be liable to arise in the absence of authority to act under critical circumstances, unexpectedly occurring, which do not admit of delay for the purposes of communication and consultation. And the factor, so placed, who acts prudently and in good faith, as the owner himself, being a wise man, would have been likely to do if personally present, finds his protection in the sincerity and sound discretion of his conduct, and is not answerable for consequences, although subsequent events may demonstrate that his principal would have been the gainer by a different course from the one he has conscientiously and discreetly adopted.

This is the rule which must govern the decision of the case here submitted to us. It is a question of fact rather than of law. The good faith of the defendants is expressly conceded. We might, in strictness, give judgment for them on the ground that the case stated does not affirmatively establish their liability. But we prefer, in conformity with what we suppose to be the intention of the parties, to consider and pass upon the question, whether the defendants did act with such prudence and discretion as to exempt them from liability. Ought they to have refused the certificates proffered in payment? If they had done so, the only redress open to the plaintiff would have been an application to the war department at Washington or to congress or to the court of claims. No rational man could regard these remedies as worth pursuing to avoid a discount of seven per cent., the whole amount of which was only $1,659.28. The expense, the delay, the uncertainty of ultimate success, would have induced any one, having regard solely to his pecuniary interest, and acting in his own affairs, to accept the proffered certificates rather than to attempt to stand upon his strict legal rights, where no legal remedy was practically available without disadvantages disproportionate to the amount at stake.

The propriety of selling the certificates may be considered more questionable. As they were sold as soon as received, justice requires us to regard the factors' entire judgment and conduct together, and if the principal was benefited by the whole exercise of their discretion, and placed in a better condition than if they had refused to assume the responsibility, it would be unfair to subject them to loss because they might in one respect have done still better. No one can say that they would have decided to accept the certificates without also, as a part of the same mental act, deciding to convert them forthwith into cash. But we do not proceed upon this narrow ground alone. In guarding the interests of a distant principal it was their duty to err on the side of prudence rather than of overconfidence. We must remember the

situation of the parties and the country at the time of the transaction, and judge by the light they then had, and not according to the wisdom that comes after the event. The ordinary facilities of correspondence between Maine and New Orleans were greatly interrupted. No telegraphic communication was possible. The mails were slow and uncertain, and somewhat exposed to capture in transit. The interval within which the most speedy interchange of letters could take place was long enough for momentous events. The pecuniary credit of the government depended on the varying fortunes of war. A single disaster might have depressed the market value of the securities far below the point at which they then stood. Other factors and agents similarly situated with themselves deemed it their duty to realize at the current rates of the market. More than half of the proceeds of the property would be required in New Orleans to pay advances and charges.

The justification of the sale is not to be placed on the ground that they had a right to make a sacrifice in order to reimburse themselves, for factors cannot sell below limits without notice to the owner of the amount due and a request for payment. But the fact that the consignor owed $14,303.45, payable in New Orleans, on account of this shipment, was a circumstance of some weight in determining the question of expediency. If the securities were to be sent to the North, and the money due to be remitted thence, double risks of transportation must be incurred.

It is impossible for us to conclude that the course adopted exhibited any such error of judgment or neglect of duty as ought to render mercantile agents personally responsible to their principals.

Judgment for the defendants.

BRAY v. GUNN.

(Supreme Court of Georgia, 1874. 53 Ga. 144).

Bray sent to defendant for collection, in New York exchange, a draft on Brown & Co. After some difficulty defendant on September 9 collected in Kimball currency, then at par, and informed plaintiff, who, on September 12 acknowledged the letter. Kimball & Co. failed, and on October 27 plaintiff demanded of defendant that he remit the amount collected in New York exchange. Upon an action of assumpsit defendant had verdict, and plaintiff appeals.

McCAY, J. If an agent, acting in good faith, disobey the instructions of his principal, and promptly informs the principal of what he has done, it is the duty of the principal, at the earliest opportunity, to repudiate the act if he disapprove. Silence in such a case is a ratification. See the case of McLendon v. Wilson & Callaway, 52 Ga. 41, from Troup county. Taking this correspondence altogether, we think

the jury had a right to find that the plaintiffs were satisfied with the act of Gunn in taking the money in the Kimball funds, and that his dissatisfaction is an after-thought in consequence of the failure of Kimball. The evidence is convincing that if they had promptly notified Gunn of their dissatisfaction, he could have saved himself. Both the parties here were commercial men, and the rule is a fair and reasonable one that it is the duty of the principal promptly to answer the letters of his agent, and if he do not do so he is presumed to acquiesce in what the agent informs him he has done or proposes to do.

Judgment affirmed.

FALSKEN v. FALLS CITY STATE BANK.[32]

(Supreme Court of Nebraska, 1904. 71 Neb. 29, 98 N. W. 425.)

AMES, C. Farrington & Towle were loan brokers doing business at Falls City, in this state. The plaintiff, Falsken, obtained through them a loan of $3,500 upon his note and mortgage upon a tract of land lying in that vicinity. Afterwards he loaned to Farrington $2,500 upon the note of the latter, secured by collaterals. Falsken lived at Kansas City. On the 29th day of July, 1899, he transmitted through the mails to the defendant, the Falls City State Bank, the Farrington note and collaterals, accompanied by the following letter, as a copy of it appears incorporated into the bill of exceptions:

"Kansas City, Mo., July 29, 1899. 914 E. 17 St. Falls City State Bank—Dear Sirs: Inclosed please find note for $2540.00 against F. E. Farrington for collection and collateral bonds; Note of $2500.00 and two Int. notes or coupons of $15.00 each attached to bond in favor of F. E. Farrington. You will give to F. E. Farrington as soon as my note is settled $2000 Two thousand to be paid Aug. 1–99 on my $3500.00 loan and $75.00 to be paid on same Int. note also due Aug. 1–99 dated 2–7–95 due in five years. Send me receipt for $2000.00 & Int. note from the said $3500.00 note & mortgage holder against me. Said loan was made through Farrington & Towle & the balance $465.00 less your collection fee send me check. Yours truly, C. H. Falsken."

On August 1, 1899, Farrington satisfied his obligation with the bank, and obtained a surrender of it and of his collaterals. On the same day, and as a part of the same transaction, the bank gave him two drafts on a New York bank for $2,000 and $105, respectively, and remitted to Falsken at Kansas City, by draft, $462.60; the aggregate of the three sums being the amount of the Farrington note. At or about the same time Farrington's receipt for the $2,000 represented by the draft for that amount was also sent to Falsken, but by whom is not

[32] Accord: Boden v. French, 10 C. B. 886, 70 E. C. L. 886 (1851). Not the power of attorney merely, but all the directions, by correspondence or otherwise, may be considered. Moyses v. Bell, 62 Wash. 534, 114 Pac. 193 (1911).

certain, and, we think, is immaterial. Farrington, who was or soon became insolvent, appropriated the New York drafts to his own use, and failed to discharge to any extent the obligation of Falsken. Falsken is shown to have admitted in the following October that the receipt had come to his hands, and he testified that he learned in the following February that Farrington had not applied the money to the payment of the plaintiff's debt. He thereupon begun a series of attempts by solicitations and threats, direct and indirect, to obtain restitution from Farrington, which were continued through the summer of 1900, but were unavailing. He seems not to have expressed any dissatisfaction with the conduct of the bank until these efforts had proved futile, although in the meantime he conversed more than once concerning the transaction with the officers of that institution.

Some time in the fall of 1900—the transcript does not disclose the date, but apparently in October or November—Falsken begun this action, alleging a breach of the contract of collection as expressed by the letter of transmission of July 29, 1899, above copied, and praying judgment for $2,000 as moneys collected thereunder, and not paid over or accounted for. The petition contains no allegation of fraud or of negligence. The answer, after admitting the contract and the collection of the money, contains what amounts to a plea of payment to the satisfaction, and with the acquiescence, ratification, and approval of the plaintiff. The reply is, in substance, a general denial of new matter. There were a verdict and judgment for the defendant, which this proceeding is prosecuted to reverse.

It will thus be seen that the sole question in the case is whether the defendant, acting in good faith, is justified by having paid out the money in the manner in which it did. The plaintiff contends that it is not, because, although the letter instructed the bank to pay the sum in controversy to Farrington as soon as it should be collected from him, it also directed it to send to Falsken a receipt for the money from the holder of the note and mortgage of the latter. But the two directions are not necessarily inconsistent. The holder was a nonresident, and it is not shown that the defendant or its officials knew either his name or whereabouts. The letter calls attention to the fact that the debt was contracted through Farrington & Towle, and expressly directs the payment of the money not to the holder, but to Farrington, who thus appeared to be intrusted with the duty of seeing it applied to the desired use. It was "to be given to Farrington * * * to be paid on my loan." The bank was certainly not charged with the duty of payment, either singly or jointly with Farrington; and if it was intended to be obligated to see to it that Farrington properly discharged his trust, that intent was not expressed, but must be inferred solely from the direction to the defendant to transmit a receipt from the holder to the plaintiff. The letter would have been literally complied with if Farrington had paid the money to the holder, and obtained his receipt for it, and delivered it to the bank for transmission.

Under all the circumstances we do not think that it was unreasonable to suppose that such was its intent, and, if so, the bank cannot, of course, be held for the consequences of Farrington's default. The most that can be said on behalf of the plaintiff is that the letter was obscure and ambiguous with respect to a matter that afterwards turned out to be of vital importance. That it was so was due to the plaintiff's own fault or negligence, and he cannot, with justice, be permitted to visit its consequences upon one who cannot be accused of fraud or neglect, but at the most of an honest mistake. We do not think it is requisite to invoke the doctrine of ratification, but the conduct of the plaintiff for a year or more after he became fully acquainted with all the facts tends very strongly to prove that he had the same understanding of his letter as did the defendant. It is surprising, if he supposed that his instructions had been violated to his damage in so large a sum, that he did not sooner demand reparation from the bank, especially when he encountered difficulty in obtaining restitution from Farrington. At all events, we think that the defendant is entitled to the protection of the rule that an agent who, in good faith and without negligence, acts upon his own understanding of faulty or ambiguous instructions, is not liable to his principal in damages, although his interpretation of them may be erroneous. Minnesota Linseed Oil Co. v. Montague, 65 Iowa, 67, 21 N. W. 184; Pickett v. Pearsons, 17 Vt. 470; Vianna v. Barclay, 3 Cow. 281.

Such being the case, the verdict is the only one that would have had support by the evidence, and the consideration of alleged errors in the progress of the trial is not required. It is recommended that the judgment of the district court be affirmed.

FEILD v. FARRINGTON.

(Supreme Court of the United States, 1869. 10 Wall. 141, 19 L. Ed. 923.)

Feild shipped cotton to Farrington & Co. with directions to sell it. Cotton was then worth 50 cents per pound. Next day he telegraphed, "Do not sell till I see you." Shortly after he saw Farrington and secured an advance of $11,000, nearly the full value of the cotton. The latter testified he expressed a wish to wait to sell the cotton for a better market. Feild testified he ordered them to sell in 10 days. Later they wrote him asking instructions, and he made no reply. After repeated letters they sold at 30 cents, and now sue to recover $6,695, the difference between their advance and the net proceeds of the cotton. On the trial Feild asked, among others, an instruction that if the jury find that Feild ordered a sale before the price should fall any lower, and they failed to sell, then plaintiffs must account to Feild for what the cotton would have brought if so sold. Defendant brings error.

STRONG, J.[88] [After holding that Feild's failure to reply to the letters amounted to a ratification of the conduct of plaintiffs:] * * *

There is still another reason why the court should not have affirmed the defendant's first proposition. The plaintiffs had made large advances on the cotton consigned to them, advances very nearly, if not quite, equal to its value, and much more than its market value at any time after their letter to the defendant was written. They had, therefore, acquired a special property in the cotton, and they held it for their own indemnity as well as for the benefit of the defendant. Now, though it is true that factors are generally bound to obey all orders of their principals respecting the time and mode of sale, yet when they have made large advances or incurred expenses on account of the consignment, the principal cannot by any subsequent orders control their right to sell at such a time as in the exercise of a sound discretion, and in accordance with the usage of trade, they may deem best to secure indemnity to themselves, and to promote the interests of the consignor. Of course they must act in good faith and with reasonable skill. This is the rule as laid down in Brown v. McGran, 14 Pet. 479, 10 L. Ed. 550, in which it was said that "where a consignment has been made generally without any specific orders as to the time or mode of sale, and the factor makes advances or incurs liabilities on the footing of such consignment, then the legal presumption is, that the factor is intended to be clothed with the ordinary rights of factors to sell, in the exercise of a sound discretion, at such time and in such mode as the usage of trade and his general duty require, and to reimburse himself for his advances and liabilities out of the proceeds of sale, and the consignor has no right, by any subsequent orders given after advances have been made or liabilities incurred by the factor, to suspend or control this right of sale, except so far as respects the surplus of the consignment not necessary to the reimbursement of such advances or liabilities."

In view of this it is apparent that the jury had more to find than the fact that Feild gave instructions to sell the cotton before any fall in the price, in order to justify a credit to him for the amount the cotton would have brought if sold at the time the instructions were given. There was, therefore, no error in denying the defendant's first prayer for instructions to the jury. * * * Reversed for another error.

[88] Part of the opinion is omitted.

MINNEAPOLIS TRUST CO. v. MATHER.

(Court of Appeals of New York, 1905. 181 N. Y. 205, 73 N. E. 987, reversing 90 App. Div. 361, 85 N. Y. Supp. 510.)

Action on a note and for commissions. Counterclaim for conversion of securities. Plaintiff loaned defendant $5,000, taking as security notes and mortgages aggregating $20,100. These notes plaintiff was to collect, but found such difficulty in doing so that defendant instructed plaintiff to foreclose the mortgages as soon as possible, bid in the property at about its present value and take judgment against the makers of the notes for any deficiency. Plaintiff foreclosed, but bid in the property for $24,434.90, the full sum due on the notes plus costs of foreclosure, and thus released the makers of the notes from further liability. The property was then worth only $20,000. Defendant alleged that this was a conversion of the securities and upon trial before a referee she was awarded $17,250.05, the difference between the amount due plaintiff and the value of these securities. Plaintiffs appeal from the affirmance by the Appellate Division of the report of the referee.

WERNER, J.[84] * * * But we fail to perceive how this finding of negligence justifies the conclusion that the plaintiff was guilty of converting the defendant's securities. It is true that the plaintiff was the pledgee of these securities as well as the agent of the defendant. It is equally true that the defendant was not notified of the foreclosure, and that the plaintiff bid in the mortgaged lands in its own name. There is, however, no finding that the plaintiff, in bidding in the property in its own name, was not acting for and on behalf of the defendant, and there is no significance in the failure to notify her of the foreclosure, when the circumstances are considered. The mortgaged property was in the state of Minnesota. The plaintiff's place of business was there, and it held an assignment of the mortgages. The defendant's attorney had instructed the plaintiff to proceed to a foreclosure and sale. The defendant lived in the state of New York, and could act much more conveniently and economically through her pledgee and agent than she could in person. It was therefore quite natural and proper that the plaintiff should use its own name in acting for the defendant. All this was entirely consistent with the plaintiff's duty as the agent and pledgee of the defendant.

It is obvious, however, that in departing from the defendant's instructions as to price the plaintiff was guilty of a breach of duty, and rendered itself liable for any damages resulting from such breach. Since there is neither evidence nor finding as to the financial responsibility of either Whitney, the mortgagor, or Van Dyke, his grantee, who assumed payment of the mortgages, the most favorable view of

[84] Part of the opinion is omitted.

the case to which the defendant can be entitled is that, if the plaintiff had obeyed instructions by bidding in the property at its actual value, a deficiency judgment might have been collected from Whitney or Van Dyke. It would seem to follow as a logical corollary that the defendant's right of recovery should be measured by what she may have lost through the plaintiff's misconduct, for the law of damages is the law of compensation. In the absence of some arbitrary legal rule, this would naturally be the difference between the value of the land and the amount bid for the same at the sale. That would seem to be the rule applicable to this case unless the plaintiff's breach of duty amounted to a conversion. We think it did not.

The true rule is very succinctly stated in Mechem on Agency (section 476), where the learned author says: "In many cases it becomes difficult to determine whether the misconduct of the agent consists in a mere breach of instructions, or amounts, in law, to a conversion, and the distinction is sometimes exceedingly technical. A distinction is nevertheless to be made. Thus it has been held that if property be delivered to an agent, with instructions to sell it at a certain price, and he sells it for less than that price, he is not liable in trover as for conversion. Sarjeant v. Blunt, 16 Johns. 74; Dufresne v. Hutchinson, 3 Taunt. 117; Palmer v. Germain, 2 M. & W. 282. In such a case the agent had a right to sell and deliver, and in that respect he did no more than he was authorized to do. He disobeyed instructions as to price only, and was liable for misconduct, but not for conversion of the property. So, where an agent was authorized to deliver goods on receiving sufficient security, but delivered them on inadequate security, it was held that trover would not lie." Cairnes v. Bleecker, 12 Johns. 300. The principle thus enunciated seems to be precisely applicable to the case at bar. There can be no sound distinction between a case of agency to sell at a specified price and one to buy within a price or limit named.

We think the cases cited by the learned Appellate Division and the defendant are not in point. In Scott v. Rogers, 31 N. Y. 676, the instructions were to sell wheat at a specified price on a particular day, and, if not so sold, to ship it to a designated consignee in the city of New York. In Laverty v. Snethen, 68 N. Y. 522, 23 Am. Rep. 184, the agent was instructed not to part with a note unless he got the money. In Comley v. Dazian, 114 N. Y. 161, 21 N. E. 135, certain goods were not to be sold without the approval and consent of the owners. In Gilchrist v. Cunningham, 8 Wend. 641, the assignee of a mortgage as collateral foreclosed the same without instructions, and one of the defendants treated the property as his own. In all of these cases the breach of duty was held to be a conversion, because the act done was wholly unauthorized and in defiance of the owner's rights. That is the point of distinction between the two classes of cases above referred to.

It is undoubtedly the duty of an agent to obey all the lawful instructions of his principal, and the agent is clearly responsible for all losses occasioned by his disobedience thereof.[85] Whitney v. Merchants' Union Express Co., 104 Mass. 152, 6 Am. Rep. 207; Blot v. Boiceau, 3 N. Y. 78, 51 Am. Dec. 345. But it is equally clear that the rule of damages as for conversion is not applicable to all cases where a principal may sustain loss through the negligence or disobedience of his agent. Wamsley v. Atlas Steamship Co., 168 N. Y. 533, 61 N. E. 896, 85 Am. St. Rep. 699; Industrial & General Trust v. Tod, 170 N. Y. 233, 63 N. E. 285. The law upon this subject is well summed up by Bronson, J., in McMorris v. Simpson, 21 Wend. 610, 613, as follows: "The most usual remedies of a principal against his agent are the action of assumpsit and a special action on the case, but there can be no doubt that trover will sometimes be an appropriate remedy. The action may be maintained whenever the agent has wrongfully converted the property of his principal to his own use, and the fact of conversion may be made out by showing either a demand and refusal, or that the agent has, without necessity, sold or otherwise disposed of the property contrary to his instructions. When an agent wrongfully refuses to surrender the goods of his principal, or wholly departs from his authority in disposing of them, he makes the property his own, and may be treated as a tort feasor. But there must be some act on the part of the agent. A mere omission of duty is not enough, although the property may be lost in consequence of his neglect. Nor will trover lie where the agent, though wanting in good faith, has acted within the general scope of his powers. There must, I think, be an entire departure from his authority before this action for a conversion of the goods can be maintained."

We think that it was error to hold the plaintiff as for a conversion, and, as this view of the case will necessitate a new trial, it is unnecessary to discuss other exceptions treated at length in the brief of the appellant.

The judgment should be reversed and a new trial granted, with costs in all courts to abide the event.

[85] The fact that the agency is gratuitous makes no difference in the liability of the agent if he undertakes the service, though the gratuitous agent would not be liable for non-feasance, a total failure to perform. Marshall v. Ferguson, 94 Mo. App. 175, 67 S. W. 935 (1902); Thorne v. Deas, 4 Johns. 84 (1809); and post, p. 565.

SECTION 3.—EXERCISE OF CARE AND SKILL

RICHARDSON v. TAYLOR.[86]

(Supreme Judicial Court of Massachusetts, 1883. 136 Mass. 143.)

Bill in equity against John W., Charles H. and Wm. E. Taylor. Plaintiff had been in partnership with the last two. He bought out their interest, and retained John W. Taylor, their father and the former book-keeper of the firm, as his book-keeper and his agent to look over the partnership accounts and effect a settlement. The father erroneously overlooked items due plaintiff amounting to $719.64.

PER CURIAM. Without considering whether the defendant John W. Taylor is properly joined in this suit, we are of opinion that the master's report shows no ground upon which he can be held liable in any form of action. He examined the books of the old firm, acting as agent of all parties. The master finds that, in doing this, he acted honestly and in good faith. There is no evidence to show that he agreed to guarantee the accuracy of the result of his examination, and there is no evidence of false representations or of fraud or negligence by him which would render him liable to the plaintiff.

Decree affirmed.

LAKE CITY FLOURING-MILL CO. v. McVEAN.

(Supreme Court of Minnesota, 1884. 32 Minn. 301, 20 N. W. 233.)

GILFILLAN, C. J.[87] Plaintiff was engaged in operating a flour-mill at Lake City. Defendant was a commission merchant and warehouseman engaged in buying and selling grain at Maiden Rock, Wisconsin. In May and June, 1882, plaintiff delivered to defendant the sum of $1,500, in consideration of which, and of a commission of three cents a bushel for purchasing, defendant agreed to buy for said plaintiff, with said money, good, sound wheat, none of it damp or musty, at the market price at Maiden Rock, and store the wheat in his warehouse, and there deliver it to plaintiff on boat or barge. Of the wheat purchased by defendant with said money, $606.15 in aggregate price, though when he purchased it he believed it to be good, sound, and not damp, was not good, sound wheat, but was damp, and by reason thereof became musty and wholly unfit for milling purposes. Plaintiff refused to receive this part of the wheat from defendant, but demanded

[86] Accord: Page v. Wells, 37 Mich. 415 (1875); Briere v. Taylor, 126 Wis. 347, 105 N. W. 817 (1905).

[87] Part of the opinion is omitted.

of him in lieu thereof wheat of the kind and character described in the agreement. With this demand he refused to comply, offering to deliver that purchased by him as aforesaid. These are the facts found by the court below. What degree of care and skill defendant bestowed in purchasing the wheat is not stated. The action is to recover the $606.15. * * *

The contract was one of employment. It created the relation of principal and agent. In the absence of express agreement, or a usage of the business modifying them, the law attaches to the relation certain rights, duties, and liabilities. On the part of the agent he is to obey the instructions of his principal, and to exercise in his employment reasonable skill and ordinary diligence; that is, the degree of skill ordinarily possessed and employed by persons of common capacity engaged in the same business, and the diligence which persons of common prudence are accustomed to use about their own business and affairs. Story, Ag. § 183. For a loss to his principal from neglect of these duties he is liable. But he is not an insurer of success in the business.[88] He does not, by merely accepting the employment, guaranty his principal against such incidental losses as may occur in the course of the employment; "because," says Mr. Justice Cooley, in Page v. Wells, 37 Mich. 415, "these are incident to all avocations, and no one, by implication of law, ever undertakes to protect another against them." If the principal desires to hold his agent liable for such losses he must make his contract of employment accordingly. We do not think the contract in this case established by the letters sufficient to change the liability of the agent.

Order reversed, and new trial ordered.

[88] Professional agents, such as lawyers and architects, do not warrant that they will make no errors, but only that they will exercise that degree of care and skill, and that judgment, which are common to the profession or business. Chapel v. Clark, 117 Mich. 638, 76 N. W. 62, 72 Am. St. Rep. 587 (1898).

The care, skill and diligence required of an agent is illustrated in every sort of business. The following cases illustrate the rule as to agents employed *to collect and transmit money*, Buell v. Chapin, 99 Mass. 594, 97 Am. Dec. 58 (1868); *to sell upon credit*, Frick & Co. v. Larned, 50 Kan. 776, 32 Pac. 383 (1893); *to collect ordinary debts*, Richards v. N. H. Ins. Co., 43 N. H. 263 (1861); *to collect negotiable paper*, Allen v. Suydam, 17 Wend. 368 (1837), reversed 20 Wend. 321, 32 Am. Dec. 555 (1838); First Nat. Bank v. Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 618 (1879); Wingate v. Mechanics' Bank, 10 Pa. 104 (1848); *to invest money*, Van Cott v. Hull, 11 App. Div. 89, 42 N. Y. Supp. 1060 (1896); Furber v. Barnes, 32 Minn. 105, 19 N. W. 728 (1884); Whitney v. Martine, 88 N. Y. 535 (1882); *to care for money and property in his possession*, Benson v. Liggett, 78 Ind. 452 (1881); Clark v. Norwood, 19 La. Ann. 116 (1867); *to effect insurance*, Shoenfeld v. Fleisher, 73 Ill. 404 (1874); Strong v. High, 2 Rob. (La.) 103, 38 Am. Dec. 195 (1842); Thorne v. Deas, 4 Johns. 84 (1809), a leading case.

ADAMS v. ROBINSON.

(Supreme Court of Alabama, 1880. 65 Ala. 586.)

This action was brought by Mrs. Margaret Robinson, a married woman, against James R. Adams, and was commenced on the 19th September, 1877. The complaint contained but a single count, which was in the words: "Plaintiff claims of defendant, who is, and was at the time of the committing of the grievance hereinafter mentioned, a real-estate agent in the city of Montgomery, in said county and State, six hundred dollars as damages, for that the plaintiff, during the year 1875, intrusted and put under the defendant's control, as a real-estate agent as aforesaid, a certain valuable store-room, and the cellars connected therewith, the property of said plaintiff, being a part of the corpus of her statutory separate estate, and being situated in said city of Montgomery," &c., describing it, "for the purpose of having the defendant, as such real-estate agent, lease, let or rent for her the said store-room and cellars, for a period not exceeding one year, beginning October, 1875, and ending October, 1876, at the rate, sum, or price of $600 per annum, payable in monthly or quarterly installments, with good and approved security; and said plaintiff avers, that she expressly instructed said defendant, in substance, in no event to lease or rent out said store-room and cellars at a less rate or price than $600 per annum, with good and approved security; and that said defendant accepted the management and control of said property under the aforesaid instructions, and it thereupon became and was the duty of said defendant not to lease or rent out the said store-rooms and cellars without good security, under and in accordance with the said instructions of plaintiff, and to pay to plaintiff the said rent as stated, and to deliver said store-room and cellars to plaintiff at the expiration of such lease or renting as aforesaid. But said defendant, disregarding his duty in the premises, violated said instructions of plaintiff, and wrongfully and without authority rented and leased said store-room and cellars to an insolvent tenant or tenants, without security, and otherwise conducted himself in so improper a manner, and so negligently and carelessly, that the rent of the said store-room and cellars, or the value thereof, for said year, was wholly lost to plaintiff. Wherefore she sues," &c.

The defendant demurred to the complaint. Demurrer overruled, and verdict and judgment for plaintiff.

SOMERVILLE, J.[39] The complaint in this case alleges a valid contract between the plaintiff and the defendant, the violation by the defendant of a duty growing out of, and imposed on him by it, and a loss consequent thereon. Its averments were, therefore, sufficient,

[39] Part of the opinion is omitted.

certainly to entitle the plaintiff to the recovery of nominal charges.—Code (1876) § 2978. If the defendant rented out the plaintiff's storehouse, contrary to her instructions, a right of action arose immediately, in favor of the latter, against the former. The principle is well settled, that when one contracts to do an act for another, and either does it unskillfully, or fails to do it at all, an action in the case will lie against him, to recover such loss or damage as may result from his negligence, carelessness, or want of skill, in the discharge of the duties imposed on him by the contract. Myers v. Gilbert, 18 Ala. 467.

Every wrong imports a damage, and when none other is proved, and the evidence shows a clear breach of duty, nominal damages are always recoverable. Bagby v. Harris, 9 Ala. 173; Sedgwick on Dam., 6th Ed., 461 [337].

Where, furthermore, an agent violates his positive instructions given him by a principal, this would constitute gross negligence, which would render him liable for such loss or damage as may be occasioned by his misconduct; and, on a principle well recognized in many cases of tort, every doubtful circumstance would be construed unfavorably to the rights and interests of the agent thus perpetrating the wrong. Story on Agency, § 333; Dodge v. Tileston, 12 Pick. 333, 334.[40] * * * Judgment affirmed.

MORRISON v. ORR.

(Supreme Court of Alabama, 1832. 3 Stew. & P. 49, 23 Am. Dec. 319.)

LIPSCOMB, C. J.[41] The defendant in error placed in the hands of the plaintiff in error, an exemplification of a judgment, rendered in Georgia, in his favor, against one Allen Orr, and took from him, a receipt for the same, in the following words, viz.:

"July 31st, 1824. This day, received of Nathan Orr, a demand in writing, against Allen Orr, for the sum of two hundred and sixty-five dollars, damages, and a further sum of fourteen dollars thirty-seven cents, costs. I am to endeavor to collect said amount, and pay it over to said Orr. If it cannot be collected, to make due return of the same, to the said Orr. Damages awarded on the 20th June, 1824. [Signed] R. C. Morrison."

[40] The agent is equally liable whether the omission of skill and diligence is the result of inattention, or incapacity, or of an intent to defraud. Heinemann v. Heard, 50 N. Y. 27 (1872).

The right of the agent to expenses and reimbursement depends upon whether they were incurred in the exercise of ordinary diligence. Brown v. Clayton, 12 Ga. 564 (1853).

[41] Part of the opinion is omitted.

This receipt was the foundation of the action. The plaintiff below charged the defendant, Morrison, with negligence, in not using the necessary means, to collect the amount of the judgment placed in his hands.

On the trial, the plaintiff proved, the defendant was the administrator of Allen Orr; that the estate had been declared insolvent; that the claim had not been allowed by the County court, nor had it been acted on; that he had demanded the money and record of the said Morrison, the defendant.

The defendant proved, that he placed the exemplification of the judgment in the hands of an attorney, for collection, in the lifetime of Allen Orr; and that suit had been brought on it; and that it was dismissed, in the year 1825, for want of testimony—the record not having been authenticated in the manner prescribed by law. That the attorney wrote to Georgia, for an exemplification, properly authenticated, but never received an answer. It was further proved, by the plaintiff, that the claim had never been filed for an allowance; and, that the settlement of the estate had been postponed, at the instance of Morrison, from September, 1828, till October, 1829. The defendant's attorney proved, that he had attended, for the purpose of laying the claim before the judge of the County court, and having it acted on; but was informed, by him, that the settlement had been postponed and that he was drawn into an error by him, as to the time when it would take place, and that it passed without his knowledge.

On this testimony, the judge on the trial, in the court below, charged the jury, that they were bound, in the absence of testimony, as to the fact, to infer that Morrison was to receive compensation for his agency; and that he was therefore bound to a greater diligence; that his not presenting the claim for an allowance, made him liable. This charge was excepted to, and is now assigned for error.

If Morrison had been an attorney, whose business and employment was the collection of debts, there is no doubt that the inference drawn by the judge would have been correct. If one receives business, within the line of his profession, or occupation, and promises attention to it—or, if he does not make an express promise, one would be implied —the law would create a presumption, that he was to receive the ordinary compensation, although not a word had been said about compensation. But, it seems to me, that the presumption rests entirely on the ground, that it is in the proper line of the business of the person so undertaking it: and, if not accustomed to such agencies for hire, that the law, so far from presuming that a compensation was to be received, would infer that it was a mere naked agency, or mandatory, in which compensation is not an ingredient, in the undertaking. It is one of those friendly offices, that, in our relations with society, daily occur, without either party ever thinking of compensation.

This distinction is recognized by Chief Justice Kent, in Thorne v. Deas, 4 Johns. 84.[42] If, then, it was a voluntary and gratuitous agency, without reward, the agent was not liable for a non-feazance —he might perform his undertaking, or not, as suited his convenience. It is true, by the civil law, he would be liable to the mandator, for all damages that ensued from his failure to perform his promise; but quite a different rule prevails at common law: by the latter, such contracts are held to be of imperfect obligation, and not to be enforced at law, for want of a sufficient consideration.

In a case, where one joint-owner of a ship, promised the other joint-owner, to have an insurance effected, and failed to do so—on the ship being lost, a suit was brought, and the promise was held to be nudum pactum. 4 Johns. 84.

It should, at any rate have been matter of proof, before the jury, whether Morrison was to receive compensation or not.

But suppose the case should be viewed in another aspect; and that the agent was to receive a compensation for his agency—are the facts in this case, such as to render him liable? If such had been the terms of his undertaking, he would only have been held to the exercise of ordinary care and attention, to the best of his skill, and not such as a professional man, that is, one whose business it was to conduct law suits, would be expected to use. Story on Bailment, 283 & 289. Orr must have known that Morrison was not an attorney at law, and he had no right to expect, in him, that skill and knowledge so necessary to conducting a law suit. He certainly calculated that he would employ an attorney at law to bring the suit, and take on himself the whole conduct of it; and if Morrison had neglected to employ counsel, and undertaken the management of a suit himself, he would, perhaps, have, by so doing, fallen short of ordinary diligence. He employed counsel, and suit was brought. * * *

We are therefore of opinion, that in any aspect, Morrison was not liable—that if he is to be considered as an agent, under wages for his services as agent, that no sufficient negligence has been fixed on him, to make him liable for the debt; and that there is much less semblance of liability, if he is to be viewed, as we think he ought, on this record, as a mandatory only.

The judgment must, therefore, be reversed.

[42] See especially Thorne v. Deas, 4 Johns. 84 (1809), per Kent, C. J. Also Grant v. Ludlows' Adm'r, 8 Ohio St. 1 (1857), in which the court discusses the various conditions to be considered in, and the indefiniteness of, definitions of, negligence and gross negligence.

WALKER v. SMITH.

(United States Circuit Court for the Third District, 1804. 1 Wash. C. C. 152, Fed. Cas. No. 17,086.)

The plaintiffs, merchants in London, having been applied to by a Mr. Brown of Philadelphia, for a parcel of goods, and doubting his solidity, were introduced by the mutual friend of the plaintiff and defendant, to the defendant (Robert Smith); and on this introduction, they sent the goods to him, and in a letter, stating their apprehensions of Brown, requested him to receive the goods, but not to deliver them to Brown, without payment for the amount being received, or such security given, as the defendant should approve; and in case neither was done, he, the defendant, was to dispose of them for account of plaintiffs. The defendant received the goods, and delivered them to Brown, without receiving payment or security. Brown afterwards failed; and by a compromise, part of the debt was received, and remitted to the plaintiffs; and this action was brought to recover the balance. In the account forwarded by the defendant, to the plaintiffs, after the failure of Brown, and the compromise, no commissions are charged.

WASHINGTON, Circuit Justice [Charging Jury:] This is a short and perfectly clear case. The facts are few, and agreed between the parties. It is my duty to state to you the law, and to apply it to the case. The principles of law, as applied to the duties and obligations of agents, have been correctly stated by the plaintiffs' counsel. No man can compel another to render him acts of friendship, or services of any kind, whether gratuitously, or with a view to a remuneration. But, if the person applied to, consents to render the service, and undertakes the business, he is bound to act in conformity to the terms on which the request was made. This rule is universal in its application, whatever may be the situations or professions of the parties; but, in commercial agencies, it is of great consequence, that it should be rigidly enforced. The defendant, by receiving the goods, and undertaking to act concerning them, bound himself to hold them, until paid for, or secured by Brown; and on his failure to do either, to dispose of them for account of the plaintiffs. But what has he done? He delivered them to Brown, without receiving payment or security; he did the very thing he was cautioned not to do. The discretion which the defendant had, was confined to the kind of security to be taken, and did not leave him at liberty to take security; or deliver the goods without any, as he might think proper. Had he taken security, which afterwards became insufficient, he would have been excused; provided he acted with that caution and prudence, which he would have observed in his own case. The defendant, by the very nature of the transaction, was entitled to a commission, as certainly as if the plaintiffs had promised it; and his relinquishing this compensation, after the loss had

taken place, cannot alter the case. Indeed, he would have been liable, if it had been undertaken gratuitously. There was no ambiguity in the plaintiff's letter upon the subject; and therefore, the defendant is without excuse, and has taken upon himself to answer for the loss. He has made himself a guarantee of the debt.

The next question is, as to the damages? I admit the principle, that in cases sounding in damages, the amount of those damages depends upon the sound discretion of the jury. In cases, where merely vindictive damages are sued for, the jury act without control on this subject; because there is no legal rule by which they can be measured; and unless they are so extravagant as to induce a suspicion of improper conduct, the court will not interfere. But in these cases, where a rule can be discovered; the jury are bound to adopt it. That rule is, that the plaintiff should recover so much, as will repair the injury sustained by the misconduct of the defendant; and applying this rule to the present case, what other measure of damages can be thought of, but the sum lost to the plaintiff by the violation of his orders? The sum demanded, is of no great consequence, perhaps, to either of the parties. on the score of its amount. But the question itself is important to the commercial interests of this country; in its intercourse with foreign nations. A precedent is to be set to determine in a case like this, whether an agent is liable for a breach of orders, and to what amount.

The jury found for the plaintiff; but a sum much inferior to the loss he had sustained.

[The plaintiffs' counsel then moved for a new trial, because the verdict was against law, evidence, and the charge of the court; but, after argument, the motion was overruled, and it was observed by Washington, Circuit Justice, that although he was not satisfied with the verdict, nor should he have assented to it as a juror, yet the question of damages, or of interest in the nature of damages, belonged so peculiarly to the jury, that he could not allow himself to invade their province; while he felt a determination to prevent, on their part, any invasion of the judicial province of the court.]

SECTION 4.—ACCOUNTING

I. General Duty

DODGE v. HATCHETT.

(Supreme Court of Georgia, 1903. 118 Ga. 883, 45 S. E. 667.)

Attachment.

Cobb, J. Dodge sued Hatchett, alleging that he delivered to the defendant, in trust, and to be sold for the account of the plaintiff, and the proceeds returned to him, certain personal property, consisting of horses, mules, and a saddle and bridle, all of the value of $850; that the defendant sold and disposed of the property, and has accounted to plaintiff only for the sum of $435; that plaintiff has demanded of the defendant the remainder of the proceeds, which he fails and refuses to pay over. It is alleged that by reason of these facts the defendant is indebted to plaintiff in the sum of $415, besides interest. The defendant answered, admitting that the property had been delivered to him as alleged, but denied that it was of the value alleged, and set up that the amount paid to plaintiff and the expenses incurred in taking care of and selling the property amounted to more than its value. He also denied that any demand had been made upon him, or that he was indebted to plaintiff in any sum whatever. The trial resulted in a verdict for the defendant; and, the plaintiff's motion for a new trial having been overruled, he excepted.

The theory of the plaintiff's case, as indicated by his petition, was that the defendant was his agent to sell and account.[48] There was evidence for the plaintiff tending to show that this was the true relation between the parties. If such was the case, it was the duty of the agent to keep and render to his principal an account of all receipts and disbursements, and, whenever reasonably requested to do so, to make and present to his principal a full and complete statement of his dealings and the state of the account between them. See Civ. Code 1895, § 3007; 1 Am. & Eng. Enc. L. (2d Ed.) 1086, 1089; Mechem, Ag. §§ 522, 528; Reinhard, Ag. § 245.

In a suit against such an agent, after the plaintiff has shown the agreement between them creating the agency, that the property was delivered to the agent, and that the same has been sold, the burden is shifted to the defendant to discharge himself by showing that no such agreement existed, or that the property was never delivered, or that

[48] A servant or clerk is not in general expected to keep accounts. Moreover an agent cannot be held liable for not keeping accounts, if it is clear his principal did not wish him to do so. Rich v. Austin, 40 Vt. 416, 433. (1867).

he has fully accounted, or some other reason why he should not be held liable to the plaintiff. See Lee v. Clements, 48 Ga. 128; Oliver v. Hammond, 85 Ga. 329, 11 S. E. 655 (2); Thomas v. Funkhouser, 91 Ga. 478, 18 S. E. 312. The judge charged the jury, in effect, that the plaintiff carried the burden of proof throughout the case, and failed to charge that the burden would be shifted under the circumstances above stated. We think this was such an error as to require the granting of a new trial, under the facts of this case. Even if the defendant's evidence was of such a character that the jury might have found that he relieved himself from liability to the plaintiff, still the error requires a reversal of the judgment, for the reason that the evidence was conflicting at many material points, and the plaintiff was entitled to have the theory of the case as indicated by his evidence submitted to the jury.

Judgment reversed. All the Justices concur.

PETERSON v. POIGNARD.

(Court of Appeals of Kentucky, 1848. 47 Ky. [8 B. Mon.] 309.)

Attachment in chancery.

MARSHALL, C. J.[44] * * * There are several circumstances which tend strongly to excite suspicion with regard to the fidelity of Poignard in his agency. Indeed we regard it as being well established, that he acted in several particulars in violation of his trust, and that he has neglected his duty in a most important point, in not having kept a precise and accurate account of all transactions pertaining to his agency. His competency to do this is well established, and it cannot be doubted that he was well aware of its importance and necessity. His failure authorizes unfavorable inferences, and subjects him now when called on for an account, to a heavy burthen of suspicion, as well as of proof.[45]

Nevertheless, we are not of opinion that on these grounds, every doubt which may arise in the case, should as a matter of course, be solved against him. The difficulties and presumptions arising from the great lapse of time, within which nearly all the parties concerned in or cognizant of the most questionable transactions now involved, have died, and many facts have doubtless been forgotten by those who remain, should operate to some extent against Peterson, who had full knowledge of Poignard's agency, and of the means in his hands, and of the interests and transactions committed to him, and yet although pressed and harassed from early in the year 1835, for debts which Poignard ought to have paid for Monroe if he could, and although he

[44] Part of the opinion is omitted.

[45] The loss, and still more the destruction, of his accounts by the agent must fall most heavily upon himself. Gray v. Haig, 20 Beav. 219 (1854).

was for several years in full correspondence with Poignard, it does not appear that he ever complained, or ever inquired of his acts, until some short time before he filed his cross bill in 1838.

Poignard, with his first answer to the cross bill, filed an account of moneys paid, and liabilities incurred for Monroe, amounting to about $4,850, and a list of moneys received for him, of about $1,391. The master to whom the accounts were referred, allowed as charges against Monroe, only about $2,700, and made additional charges against Poignard, which swelled the account against him to about $7,663; and calculating interest on each side, stated a balance against Poignard of more than $8,500. To this report, Poignard filed nineteen exceptions, complaining of charges made and credits refused. He also filed eleven exceptions to the account stated, as between Peterson and Monroe, and Peterson filed four exceptions to the two accounts.

The general dismissal of the bill without an explicit decision upon any of these exceptions, has thrown upon this Court the labor of investigating them all upon the pleadings and evidence contained in a record of more than 900 pages.

As already said, the only difficulty which it is necessary to meet, arises upon the accounts between Poignard and Monroe. Upon many of the exceptions made to this account, the question as to the propriety of the charge made, or the credit claimed, admits of no certain, and not even a satisfactory solution. We have had to weigh probability against probability, conjecture against conjecture, and doubt against doubt.

We do not deem it necessary to state in this opinion the facts and considerations applying to the numerous exceptions to the report of Poignard's accounts. After a laborious investigation of the record, and the fullest consideration which we have been enabled to bestow upon it, we have come to the conclusion, that after making all just charges and credits that are sufficiently established on either side, and including all claims made by Poignard, he stands indebted to Monroe's estate in the sum of at least one thousand dollars; and under the uncertainties which meet us on every side, we cannot safely say that he owes more.

Wherefore, the decree is reversed, and the cause remanded, with directions to render a decree for the payment of one thousand dollars by Poignard, in discharge of his debt to Monroe's heirs, and in discharge of so much of Peterson's demand against Monroe's estate, which sum should be decreed either to Peterson or for the benefit of the complainant, Fisk, as circumstances may dictate and Poignard should pay the costs both in this and in the Chancery Court.

MOYSES v. ROSENBAUM.

(Appellate Court of Illinois, 1900. 98 Ill. App. 7.)

FREEMAN, P. J. Plaintiff in error sued to recover a balance claimed to be due him for a salary upon a written contract for the last month of the term of his employment thereunder. The cause was submitted to the trial court without a jury, and from the judgment rendered, this writ of error is prosecuted.

It appears from the contract that plaintiff in error was employed for a year at a fixed salary payable monthly, and was to receive also under certain conditions a specified commission not involved in this controversy. The contract further provided that defendant in error should pay all the plaintiff's traveling and other expenses not to exceed $2,250 per annum. It appears from the stipulation of facts between the parties that the defendant repeatedly demanded of the plaintiff itemized statements of the money expended by the latter on account of such expenses. These the plaintiff never rendered. He merely reported, without further explanation, that his expenses had been in one case $385; in another $27; in another $531.40; and another $562.60; adding in the last instance that his total expenses for the year had been $1,506. No statement of what the expenses were, for which this sum had been expended, was ever vouchsafed by the employé, but there is evidence tending to show that in one case the latter wrote to his employer he had expended money for a purpose which investigation showed it had not been used for.[46]

That the employer, Rosenbaum & Co., had a right to be informed specifically what the expenses were which they were called upon to pay under the contract, admits of no serious question. They agreed to pay "traveling and other expenses" incurred by plaintiff in error while in their employment, not to exceed a certain sum. They had a right to know that the expenses charged were legitimate business charges. Indeed, it is stipulated between the parties "that the term 'expenses' as used in the contract, includes only actual outlays necessarily made by plaintiff for railroad and stage fares, meals en route, hotel bills, porterage, cartage, and a reasonable amount for the treating of customers, and also includes the expense of maintaining an office in Chicago." The meaning of the contract undoubtedly is that the defendant in error agreed to pay only such expenses as these enumerated, legitimately incurred in their business, the total amount not to exceed in any event $2,250. But they did not agree to pay any other or different expenses plaintiff in error might incur, and were not bound to pay anything without knowing what it was for, and that it was a legitimate expense of the business.

Plaintiff in error therefore stands charged with the money advanced

[46] The more complicated and difficult the accounts, the more imperative the duty of the agent. Jenkins v. Gould, 3 Russ. 385 (1827).

him for expenses and not accounted for. Until he does so account, defendant in error is entitled to offset against his account the balance of $231.91, claimed to be due for salary. "The law is settled and sustained by reason that the duty of an agent is not fulfilled in a case of this kind by reporting to his principal that he has spent a round sum of money in prosecuting his employment. * * * His duty to keep and preserve true and correct statements of account is a necessary consequence of his duty to account. An account is a detailed statement. It must be something which will furnish to the person having the right thereto, information of a character which will enable him to make some reasonable test of its accuracy and honesty." Wolf Co. v. Salem, 33 Ill. App. 616.

The views above expressed make it unnecessary to discuss in detail the propositions of law submitted by plaintiff, the refusal of which by the trial court is assigned as error. No error was committed in refusing to hold them as expressing the law applicable. The judgment of the Superior Court is affirmed.

KELLOGG v. KEELER.

(Appellate Court of Illinois, 1888. 27 Ill. App. 244.)

GARNETT, J. This was an action of assumpsit by appellee against appellant, judgment being given for $750 against appellant, from which he appeals. In the summer of 1886 Keeler sold to Kellogg four lots in Chicago for $6,400. The transaction was not closed by deed until late in October of that year. Before the delivery of the deed to Kellogg the lots were again sold by Keeler to one Hill for $7,550. The latter sale was made, as Keeler now claims, by authority of Kellogg. In his evidence Keeler says, when he agreed to let Kellogg have the property for $6,400, he told him he would let him have it if he would allow him (Keeler) to re-sell it for him; that Kellogg said if he made $100 a lot profit he would be satisfied; that he (Keeler) told him he thought he could sell it for that before he got the deed, as property was advancing. That authority given to sell the lots for $6,800, is, to some extent, corroborated by the evidence of Hoffman, a witness for appellee. But there is no evidence in the record tending to support appellee's claim that he is entitled to the difference between $6,800 and $7,550. To maintain that proposition he testified to a conversation with appellant some months after he was given authority to sell, when he put certain questions to appellant for the purpose of securing an admission that he was to have all he sold the lots for above $6,800. But Kellogg made no such admission, nor does any witness testify that such was the contract. There is, in fact, nothing in the record that warrants appellee's contention. Authority to an agent to sell at a stipulated figure does not amount to a contract to give him all he sells

for above that sum. Kerfoot v. Hyman, 52 Ill. 512. It is still the duty of the agent to make the property bring the highest price that can be obtained, and account to his principal for the whole sum less his reasonable compensation.[47]

The only evidence as to what was a reasonable compensation on such a sale tended to prove that the highest reasonable charge would be a much less sum than $750. There being no evidence to support a verdict for $750, the judgment is reversed and remanded.

Reversed and remanded.

TRIPLER v. OLCOTT.

(Court of Chancery of New York, 1818. 3 Johns. Ch. 473.)

Fanning, being indebted to Lord, gave him a bill of sale, absolute on its face, of the ship Zephyr, on the agreement that Lord should recompense himself and hold the ship and surplus earnings to the use of Fanning. Later for a similar purpose he assigned the ship and surplus earnings to Tripler and Craig. Olcott was employed by Fanning as master of this ship, and after the assignment to Lord he accounted to him as owner for all earnings.

KENT, Chancellor.[48] This case was brought to a hearing on the part of the defendant Olcott, and we are only to discuss the case as it regards him.

Two of the plaintiffs (Tripler & Craig) have not shown any right or title whatever to an account, for they have not proved the assignment charged in the bill to have been made by Fanning to them on the 18th of December, 1813. This assignment is the only foundation of their claim, and it is not admitted by the answer. We must recur to the resulting trust of Fanning, as the only existing right shown on the part of the plaintiffs.

The bill of sale from Fanning to Lord was absolute upon its face, and no resulting trust appears. Nor is there proof of the express agreement charged in the bill. The evidence, that the bill of sale was intended to be qualified and not absolute, appears from the two letters of Lord to Olcott, of the 29th of December, 1812, and the 16th of August, 1813. In the one, he says, that the bill of sale arose from the failure of Fanning and others, and was for the purpose of paying custom house bonds, and to save friends; and in the other he states,

[47] The duty of the agent to account is not affected by the fact that the profit or advantage he received was the result of the violation of his duty as agent. Graham v. Cummings, 208 Pa. 516, 57 Atl. 943 (1904) nor by the fact that the profits were received after the account with his principal has been settled. Morrison v. Thompson, 43 L. J. Q. B. 215, L. R. 9 Q. B. 480, 30 L. T. 869, 22 W. R. 859 (1874). The principal has his election to take his money, or the property which the agent has without authority purchased with this money. Greene & Co. v. Haskell, 5 R. I. 447 (1858).

[48] Part of the opinion is omitted.

that he took the ship and freight as security for about $6,000, and to cover a demand of one Carey for $1,500. These were representations entirely contrary to the statement in the bill of the agreement between Fanning and Lord, made on the delivery of the bill of sale. Nor do the two accounts given in the letters correspond with each other, and they were mentioned to Olcott rather incidentally, and without any full, precise, and satisfactory explanation of the trust. They were not intended to form any rule or guide to Olcott's conduct, and he could only look to Lord, as the owner. The authentic evidence which he had of any right or title in the property, was the bill of sale and the letter of attorney; and he could not, and did not, recognize any other title, interest, or authority. A resulting trust, mentioned in this incidental and obscure manner, and especially when attended with the clear title and positive acts and instructions of Lord as owner, did not, probably, attract any attention from Olcott; and he says, in his answer, that he considered Lord as the sole owner, and as having the exclusive interest, and that he would not have accepted of any agency for any other person, distinct from that of master of the ship.

On his return to the United States, in October, 1814, he duly accounts to, and with Lord; and the question is, whether he is bound to account also to Fanning.

It does not appear to me that Olcott could, with safety or propriety, have dealt with any other person than Lord. He had no business or concern with the dealings between Lord and Fanning, and the loose hints communicated to him by Lord were of no use. It would be equally dangerous and inconvenient, in the business and affairs of the world, to deny, that Olcott could not definitively and safely account with Lord, under the circumstances of this case. If there had been fraud and collusion, charged and proved between him and Lord, in the settlement, to the prejudice of the known rights of others, it would have presented a very different question. But no such allegation or proof exists; Fanning must look to Lord, and cannot look beyond him, for an account of the management and proceeds of the property assigned to him in trust.

It is stated to have been held in Pollard v. Downes, 2 Ch. Cas. 121, that where a trustee made a letter of attorney to S. to manage and receive the rents and profits of land, and S. afterwards accounted to the trustee, for his agency, he was, after the death of the trustee, and on a bill by the cestui que trust, directed to account to him.

That case is so destitute of all facts and circumstances requisite to a clear understanding of the principle and the application, that it can scarcely be regarded as an authority. It may be that there was a collusion between the trustee and the agent, or that the agent had notice from the principal not to account with the trustee, or that the trust had expired at the time. It is impossible to be maintained, that if an agent duly and fairly accounts with his immediate and authorized principal, that he is bound, in all cases, to account over again to the person stand-

ing behind his immediate principal. This would be a doctrine not to be endured; there must have been something in the case cited which does not now appear, and which gave it a special direction. Lord Eldon, in Beaumont v. Boultbee, 7 Vesey, 605, 610, 617, laid down this rule, that an account settled between an under and an upper agent, without vouchers, and upon mere confidence, was not to be considered as settled against the principal, without allowing him the liberty to surcharge and falsify those accounts. But, in that case, it appeared that the under steward, (as he was termed,) was employed both by the upper steward and the principal, and the liberty given to the principal went no farther than to surcharge and falsify; and that was founded on the extraordinary and unusual mode of accounting which had been adopted in that case. Under such checks and limitations, there can be no doubt that the party ought to account again to the person who has the ultimate interest. But when no special circumstances appear, and there is no fraud, then I apprehend the general rule to be otherwise, and that it was truly declared in Clavering's Case, Prec. in Ch. 535. * * *

Bill dismissed.

THARP v. THARP.

(Supreme Court of Vermont, 1843. 15 Vt. 105.)

REDFIELD, J. This being a bill in chancery to compel an account, in a case where a court of law has concurrent jurisdiction with courts of equity, if the claim is barred at law, it cannot be enforced in equity. This is a uniform rule. Staniford v. Tuttle, 4 Vt. R. 82. Hall v. Hall, 8 Vt. 156.

This claim is of nearly forty years standing, and the only ground of exception to the operation of the statute of limitations, is the fact, that the present claimant and his ancestor, in whose right he claims, have resided without the state and beyond sea. All claims of such persons, until the year 1832, were exempted from the operation of the statute of limitations in this state. At that time this exemption was repealed without any saving in favor of those even, whose rights, by the general terms of the statute of limitations, had already become barred; thus, in terms, at once extinguishing all such claims. It is not necessary, now, to inquire whether it could have been the intention of the legislature thus summarily to annihilate this class of claims, or how far, giving the statute its literal operation, it is to be esteemed a contravention of the United States constitution. It is sufficient for the present case, that, after the repealing of that exemption, and before the bringing the present bill, more than six years had elapsed, and thus the plaintiff's right had become effectually barred by the statute of limitations. This is a sufficient reason why this bill cannot be maintained.

There is one other point in the case, which seems to be equally conclusive. This defendant, it is admitted, rendered to the orator's an-

cestor a full account of his proceedings, as early as 1807, and transmitted to him a copy of his account current in 1811. The ancestor survived until 1821, with these accounts rendered, in his hands, and without any the least objection to their fairness and accuracy; and after his decease, until the filing of the present bill in 1841, twenty years more have elapsed, and no complaint is made by the heir. Under these circumstances, it would be wholly unprecedented for a court of equity to open the account. Mr. Justice Story, 1 Equity Jurisp. 501, says, "An account rendered shall be deemed an account stated, from the presumed approbation and acquiescence of the parties, unless an objection is made thereto in a reasonable time." And "a settled account will be deemed conclusive between the parties, unless some fraud, mistake, omission or inaccuracy is shown." [49]

This bill is not brought with any view to surcharge or falsify an account settled between the parties. That the time, which has elapsed since the account was rendered, is sufficient to bind the parties to it, as an account settled, is apparent. In Murry v. Toland, 3 Johns. Ch. 569, 575, it is laid down "If a merchant receives a stated account from abroad, and keeps it by him, any length of time, e. g. two years, without objection, he is bound by it, and equity will not decree an account to be taken afterwards." The cases of Ellison v. Maffatt, 1 Johns. Ch. 46, and Mooers v. White, 6 Johns. Ch. 360, are to the same point. Also Irvine v. Robertson, 3 Rand. (24 Va.) 549.

Decree of the chancellor affirmed with costs.

[49] An account stated is a mere admission that the account is correct. It is only prima facie, and does not work an estoppel. The account may still be impeached for errors. Ruffner v. Hewitt, 7 W. Va. 585 (1874); Perkins v. Hart, 11 Wheat. 256, 6 L. Ed. 463 (1826). Failure in a reasonable time to object to an account rendered is presumptive acceptance of it as correct, but the presumption is not conclusive and may be rebutted by circumstances accounting for the failure to object. Lockwood v. Thorne, 18 N. Y. 288 (1858); Id., 11 N. Y. 173, 62 Am. Dec. 81 (1854).

II. TITLE AS BETWEEN PRINCIPAL AND AGENT

(A) In General

SALEM TRACTION CO. v. ANSON.[50]

(Supreme Court of Oregon, 1902. 41 Or. 562, 69 Pac. 675.)

Trover for $3,561.08 which the complaint alleged, and the lower court found, defendant, as manager of plaintiff's street railway, had collected and not accounted for.

BEAN, J.[51] * * * It is next contended that the plaintiff's remedy was by an action on contract, and not in trover, and hence the complaint does not state facts sufficient to constitute a cause of action. As a general rule, the mere failure of an agent to pay over or account for money collected for his principal will not sustain an action of conversion, because the agent is not bound to pay over the identical money received, and the transactions create nothing more than the relation of debtor and creditor between him and his principal. Royce v. Oakes, 20 R. I. 418, 39 Atl. 758, 39 L. R. A. 845; Hartman v. Hicks, 28 Misc. Rep. 527, 59 N. Y. Supp. 529; Vandelle v. Rohan, 36 Misc. Rep. 239, 73 N. Y. Supp. 285; Walter v. Bennett, 16 N. Y. 250; Borland v. Stokes, 120 Pa. 278, 14 Atl. 61. But where the principal is entitled to receive, and the terms of the employment of the agent require him to pay over, the identical money received, an action of trover will lie for its conversion. Jackson v. Anderson, 4 Taunt. 24; Petit v. Bouju, 1 Mo. 64; Bunger v. Roddy, 70 Ind. 26; Donohue v. Henry, 4 E. D. Smith, 162; Farrand v. Hurlbut, 7 Minn. 477 (Gil. 383); Cotton v. Sharpstein, 14 Wis. 226, 80 Am. Dec. 774; Express Co. v. Piatt, 51 Minn. 568, 53 N. W. 877.

And such was the case here. The defendant was the agent and general manager of the plaintiff corporation, with power and authority to collect the moneys due it for services rendered. All the money so collected belonged to his principal. The title immediately vested in the plaintiff, and the defendant had no interest therein, and no authority to make any use thereof whatever. He was bound by the terms of his employment to pay the money over to the treasurer of the plaintiff corporation, and could not even use it for the payment of current expenses without the approval of his superior. The plaintiff, as a matter of right, therefore, was entitled to the identical money

[50] Accord: Wells v. Collins, 74 Wis. 341, 43 N. W. 160, 5 L. R. A. 531 (1889), in which the court found the relation between agent and principal was not one of debtor and creditor, but the property in the very money collected by the agent vested in the principal. Lance v. Butler, 135 N. C. 419, 47 S. E. 488 (1904), holding that the proceeds of sale by the agent are a trust fund held by him for the principal.

[51] Part of the opinion is omitted.

received by the defendant on its account, and any unlawful use or misapplication thereof constituted a conversion, for which an action of trover was an appropriate remedy. Mech. Cas. Ag. § 476; Henry v. Sowles (C. C.) 28 Fed. 521; Cotton v. Sharpstein, 14 Wis. 226, 80 Am. Dec. 774. * * *

DIXON v. HAMOND.

(Court of King's Bench, 1819. 2 B. & Ald. 310.)

Dixon as assignee in bankruptcy of Davidson brings assumpsit for money had and received. Davidson was the surviving partner of Flowerden, who owned a ship, the Sidney, which he pledged to defendant as security for a loan. Defendant was an insurance broker, and effected an insurance on the ship as agent of Flowerden and Davidson. Verdict for plaintiffs and defendant moved for a new trial.

ABBOTT, C. J. If, in order to maintain this action, it were necessary to shew that the legal title to this ship was in the present plaintiffs, there could be no doubt that the defendant would be entitled to our judgment. For it is clear that the ship never belonged to the partnership at all. It was originally the property of Flowerden alone, and by him the legal interest was first transferred to Hart, and subsequently vested in the present defendant. He, however, in 1815 receives an order to effect an insurance on the ship and freight on the partnership account, and he does effect it, and accounts with the partnership for the premiums.[52] After this, the ship is lost, and he receives the money from the underwriters. Then, in truth, the legal title to the ship has nothing to do with this question. The right of the plaintiffs to recover here depends on a settled rule of law, that an agent shall not be allowed to dispute the title of his principal, and that he shall not, after accounting with his principal, and receiving the money in that capacity, afterwards say, that he did not do so, and did not receive it for the benefit of his principal, but for that of some other person. Here the defendant has received the money as agent for the partnership, and he cannot now be permitted to say, that he received it for the benefit of Flowerden alone. All the rest of the world, except the defendant, might dispute the legal title of the plaintiffs to the ship, but he cannot do it. There is, therefore, no reason for granting this rule.[53]

[52] If the agent acknowledge the receipt of money or property for the principal, and induce the principal to act thereon, he will be estopped thereafter to show that he did not receive it. Wood v. Blaney, 107 Cal. 291, 40 Pac. 428 (1895).

[53] The concurring opinions of Bayley and Holroyd are omitted.

WITMAN v. FELTON.

(Supreme Court of Missouri, 1859. 28 Mo. 601.)

NAPTON, J. This was a suit between principal and agent. The latter had collected a sum of money for the former under a power of attorney, and this action was brought to recover it. The defence was, that the money did not belong to the principal and this was offered to be shown generally, and also by the production of a paper in possession of the plaintiffs. The proof was excluded by the court and this exclusion presents the only question in the case.

An agent has discharged his duty when he pays over to his principal the money he was authorized to collect. It is of no importance to him whether his principal's title to the money or property be good or bad. This is a matter which concerns third persons, who, if they desire to protect their interests, can easily do so, either before or after the termination of the controversy between the principal and agent. This principle of law is conceded, but it is said that the paper called for in this case, and which it was alleged would show that the money collected by the defendant belonged to third persons, was admissible to show that the money was not really collected under the power of attorney, and was not collected as agents for the plaintiffs. Of course this could be shown, and if there had been any offer to show this, there could be no doubt the evidence should have been admitted. But the mere fact that the money collected belongs to third persons has no tendency to disprove the allegation that it was collected as money of the principal, especially where the only proof previously introduced in the case was positive and unequivocal that the money was collected under the power of attorney and as agent for the plaintiffs. If the simple fact that the money does not really belong to the principal is sufficient to rebut, or entitled to any weight in rebutting the positive proof of agency, then such evidence must be legitimate in all cases of this kind, and in every suit between principal and agent, the latter can go into the question of the ownership of the property or money which he has collected, upon the vague presumption that the money or property was not obtained through the agency, simply because the principal did not have any right to it. Such a course would defeat all the rules of evidence, and practically annul the responsibility of agents.

Judgment affirmed. The other judges concur.

(B) Illegality as a Defense

TENANT v. ELLIOTT.

(Court of Common Pleas, 1797. 1 Bos. & P. 3, 4 Rev. Rep. 755.)

Assumpsit for money had and received from an insurance company upon an illegal policy of insurance on a ship lost at sea.

BULLER, J. Is the man who has paid over money to another's use to dispute the legality of the original consideration? Having once waived the legality, the money shall never come back into his hands again. Can the defendant then in conscience keep the money so paid? For what purpose should he retain it? To whom is he to pay it over; who is entitled to it but the plaintiff?

EYRE, Ch. J. The defendant is not like a stake-holder. The question is, whether he who has received money to another's use on an illegal contract, can be allowed to retain it, and that not even at the desire of those who paid it to him? I think he cannot.

The defendant took nothing by his motion.

BALDWIN BROS. v. POTTER.

(Supreme Court of Vermont, 1874. 46 Vt. 402.)

General assumpsit. Defendant sold for plaintiff prize candy on commission. He claimed this was "setting up a lottery" within the meaning of the Vermont statute, and refused to account. Judgment for plaintiff.

PIERPOINT, Ch. J. We do not find it necessary in this case to consider the question as to whether the contract for the sale of the property referred to, by the plaintiffs, to the several persons who purchased it, were contracts made in violation of law, and therefore void, or not. This action is not between the parties to those contracts; neither is it founded upon, or brought to enforce them. If those contracts were illegal, the law will not aid either party in respect to them; it will not allow the seller to sue for and recover the price of the property sold, if it has not been paid; if it has been paid, the purchaser cannot sue for and recover it back. The facts in this case show that the purchasers paid the money to the plaintiffs, not to the plaintiffs personally, but to the defendant as the agent of the plaintiffs, authorized to receive it. When the money was so paid, it became the plaintiff's money, and when it was received by the defendant as such agent, the law, in consideration thereof, implies a promise on the part of the defendant, to pay it over to his principals, the plaintiffs; it is this obligation that the present action is brought to enforce; no illegality attaches to this contract. But the defendant insists that, inasmuch as the plaintiff

could not have enforced the contracts of sale as between himself and the purchaser, therefore, as the purchaser has performed the contracts by paying the money to the plaintiffs through me, as their agent, I can now set up the illegality of the contract of sale to defeat an action brought to enforce a contract on my part to pay the money that I as agent receive, over to my principal. In other words, because my principal did not receive the money on a legal contract, I am at liberty to steal the money, appropriate it to my own use, and set my principal at defiance. We think the law is well settled otherwise, and the fact that the defendant acted as the agent of the plaintiffs in obtaining orders for the goods, does not vary the case. Tenant v. Elliott, 1 B. & P. 3; Armstrong v. Toler, 11 Wheat. 258, 6 L. Ed. 468; Evans v. City of Trenton, 24 N. J. Law, 764.[54]

We think the certificate granted by the county court was properly granted. It has been urged in behalf of the defendant, that the zeal with which he has defended this case shows that he intended no wrong; but we think the man who receives money in a fiduciary capacity, and refuses to pay it over, does not improve his condition by the tenacity with which he holds on to it.

Judgment of the county court affirmed.

BERNARD v. TAYLOR.

(Supreme Court of Oregon, 1893. 23 Or. 416, 31 Pac. 968, 18 L. R. A. 859, 37 Am. St. Rep. 693.)

Action to recover $560 deposited with defendant as a wager on a foot race. Judgment for plaintiff.

LORD, C. J.[55] * * * The next contention for the defendant is that the alleged agreement was corrupt, illegal, and criminal, in this: that it was in advance "fixed" that one of the parties should win, and that certain persons should lose their money. In other words, that the

[54] In United States Express Co. v. Lucas, 36 Ind. 361 (1871), the rule is stated thus: "We think the agent is estopped to dispute the title of his principal to the money which he has received for him. A tenant cannot dispute the title of the landlord, under and by virtue of which he obtained possession of the premises. A bailee cannot dispute the title of the bailor from whom he received the thing bailed; especially he cannot set up title in himself. Why should an agent be allowed to place himself in a position of hostility to his principal and himself claim that which he has received for him? Paley on Agency, p. 10, and note k, and authorities there cited."

Approved in Reed v. Dougan, 54 Ind. 306 (1876), and in Wilt v. Town of Redkey, 29 Ind. App. 199, 64 N. E. 228 (1902).

Cf. Mexican Int. Banking Co. v. Lichtenstein, 10 Utah, 338, 37 Pac. 574 (1894), in which the court held that an employment to sell lottery tickets creates no agency at all. The employment was void. Both parties were principals in a crime and the courts will not help to compel a division of the spoils. Contra: Norton v. Blinn, 39 Ohio St. 145 (1883), which cites with approval Baldwin v. Potter above.

[55] Part of the opinion is omitted.

agreement had in contemplation "a job race." This, it is claimed, put the plaintiff in pari delicto with the defendant, and, as a consequence, he is entitled to the benefit of the rule, potior est conditioni possidentis. The general rule is that the law will not interfere in favor of either party in pari delicto, but will leave them in the condition in which they are found, from motives of public policy. There is no doubt, where money has been paid on an illegal contract, which has been executed, and both parties are in pari delicto, the courts will not compel the return of the money so paid. But the cases show that an important distinction is made between executory and executed illegal contracts. While the contract is executory, the law will neither enforce it nor award damages; but, if it is already executed, nothing paid or delivered can be recovered back. So that, while the contract is executory, the party paying the money or putting up the property may rescind the contract and recover back his money. This arises out of a distinction between an action in affirmance of an illegal contract and one in disaffirmance of it. In the former, such an action cannot be maintained, but in the latter an action may be maintained for money had and received. The reason is that the plaintiff's claim is not to enforce, but to repudiate, an illegal agreement. Whart. Cont. § 354. In such case, there is a locus penitentiæ. The wrong is not consummated, and the contract may be rescinded by either party.

In Edgar v. Fowler, 3 East, 225, Lord Ellenborough said: "In illegal transactions, the money has always been stopped while it is in transitu to the person entitled to receive it." As Lord Justice Mellish said: "To hold that the plaintiff is entitled to recover does not carry out the illegal transaction, but the effect is to put everybody in the same situation as they were before the illegal transaction was determined upon, and before the parties took any steps. If money is paid or goods delivered for an illegal purpose, the person who has so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither can he maintain an action. The law will not allow that to be done." Taylor v. Bowers, 1 Q. B. Div. 291. In Hastelow v. Jackson, 8 Barn. & C. 221, which was an action by one of the parties to a wager on the event of a boxing match, commenced against the stakeholder after the battle had been fought, Littledale, J., said: "If two persons enter into an illegal contract, and money is paid upon it by one to the other, that may be recovered back before the execution of the contract, but not afterwards." Smith v. Bickmore, 4 Taunt. 474; Tappenden v. Randall, 2 Bos. & P. 467; Lowry v. Bourdieu, 2 Doug. 452; Munt v. Stokes, 4 Term R. 561; Insurance Co. v. Kip, 8 Cow. 20; Merritt v. Millard, *43 N. Y. 208; White v. Bank, 22 Pick. 181; O'Bryan v. Fitzpatrick, 48 Ark. 490, 3 S. W. 527. "And this rule," says Mr. Justice Woods, "is applied in the great majority of the cases, even when

the parties to an illegal contract are in pari delicto, because the question which of two parties is the more blamable is often difficult of solution, and quite immaterial." Spring Co. v. Knowlton, 103 U. S. 60, 26 L. Ed. 347. The object of the law is to protect the public and not the parties. This is upon the principle that it best comports with public policy to arrest the illegal transaction before it is consummated. Stacy v. Foss, 19 Me. 335, 36 Am. Dec. 755.[56]

It only remains to apply these principles to the facts. These show that the plaintiff was cognizant that the race had been fixed in advance; that one of the parties should win, and that certain other persons should lose their money; that it was a bogus race, and the arrangement based upon it corrupt, and designed to cheat and defraud the other parties; but at the same time they show that he repented, and repudiated the transaction before it was consummated, by demanding the return of his money the evening of the day before the race, and on the day of the race, but before it was to come off, and that the defendant refused to pay it back, and that he afterwards forbade the defendant to pay said money to any other person than himself. He availed himself of the opportunity which the law affords a person to withdraw from the illegal contract before it has been executed. He repented before the meditated wrong was consummated, and twice demanded to withdraw his money, and thereby rescinded the contract. To allow the plaintiff to recover does not aid or carry out the corrupt and illegal transaction, but the effect is to put the parties in the same condition as they were before it was determined upon. By allowing the party to withdraw, the contemplated wrong is arrested, and not consummated. This the law encourages, and no obstacle should be thrown in the way of his repentance. Hence, if the plaintiff retreated before the bet had been decided, his money ought to have been returned to him; and, in default of this, he is entitled to recover.

There was no error, and the judgment must be affirmed.

[56] Until the illegal contract is executed both parties are given an opportunity for repentance and rescission. Seeing the error of his way, the law extends to him a helping hand by aiding him to recover back anything of value with which he may have parted. Wassermann v. Sloss, 117 Cal. 425, 49 Pac. 566, 38 L. R. A. 176, 59 Am. St. Rep. 209 (1897); Munns v. Donovan Com. Co., 117 Iowa, 516, 91 N. W. 789 (1902); Smith v. Blachley, 188 Pa. 550, 41 Atl. 619, 68 Am. St. Rep. 887 (1898). Neither party can recover if it is necessary for him to set up the illegal transaction. If the principal can make out his claim without setting it up, the agent cannot defend on the ground that the property was to be used for, or was obtained from, an unlawful purpose. Clarke & Co. v. Brown, 77 Ga. 606, 4 Am. St. Rep. 98 (1886). On the other hand if the principal's right of recovery is so wrapped up with the illegal contract that he must set it up to make his case he cannot succeed. Mexican Int. Banking Co. v. Lichtenstein, 10 Utah, 338, 37 Pac. 574 (1894).

(C) Jus Tertii

HANCOCK v. GOMEZ.

(Supreme Court of New York, 1871. 58 Barb. 490.)

Plaintiff sent to defendants an order for $176.33½ on Sale & Co., owners of the bark Reindeer, for wages due one Hanson as mate of said bark. Defendants collected the amount. Later a woman claiming to be the widow of Hanson, but furnishing no proofs, demanded the money, and defendants paid it back to Sale & Co., who paid it to her. Verdict directed for defendants.

CARDOZO, J. The money for which this action was brought was collected by Gomez, Wallis & Co., by authority of, and as agents for, the plaintiff, and they acknowledged that they had so collected it, both by their accounts rendered, and by their letter to the plaintiff of October 7, 1862. Having so received the money, they had no right to return it to Sale & Co. They cannot dispute the title of the principal, by setting up an adverse title in a stranger. Murray v. Vanderbilt, 39 Barb. 140; Ross v. Curtiss, 31 N. Y. 606.[57]

The ruling below was therefore erroneous, and the judgment should be reversed and a new trial ordered; costs to abide the event.

MOSS MERCANTILE CO. v. FIRST NATIONAL BANK.

(Supreme Court of Oregon, 1905. 47 Or. 361, 82 Pac. 8, 2 L. R. A. [N. S.] 657, 8 Ann. Cas. 569).

Suit in equity to restrain the prosecution of an action at law brought by defendant against William Miller to recover back money collected by him as attorney on a judgment in an action by Helmick against Porter. Neither knew plaintiff had, or claimed, an interest in the judgment. Helmick assigned to defendant bank, which notified Miller to collect and remit, less his fees for collection. Miller collected, but while preparing to remit yielded to plaintiff's demand for the money, on the supposition that the bank was acting for plaintiff. Defendant thereupon sued Miller, and plaintiff seeks to restrain this suit.

BEAN, J.[58] [After holding that there was no theory on which plaintiff could maintain this suit in equity:] * * * Now, under the facts as here claimed by the defendant, Miller's relationship to it was that of a mere agent or attorney to collect and remit the

[57] The agent will be protected in paying back the money if it was paid to him by the third person for the principal through fraud or mistake. Needles v. Fuson, 24 Ky. Law Rep. 369, 68 S. W. 644 (1902).

[58] Part of the opinion is omitted.

amount due on the Helmick judgment; and while the general rule is that an agent who receives money for his principal is estopped to deny the title, and must return or account for the money to him for whom he received it, this rule does not prevent an agent, when sued by his principal, from showing that he has been divested of the property by a title paramount to that of his principal, or that he has paid over the money or property to one holding such a title. 1 Clark & Skyles, Agency, § 431; Mechem, Agency, § 525; Peck & Clark v. Wallace & Lewis, 19 Ala. 219; Peyser v. Wilcox, 64 How. Prac. 525; Sims v. Brown, 6 Thomp. & C. 5; s. c., affirmed 64 N. Y. 660. The rule in such case is practically the same as that governing the relation of bailor and bailee, and surrendering to a paramount title is a good defense. Western Transportation Co. v. Barber, 56 N. Y. 544; Burton v. Wilkinson, 18 Vt. 186, 46 Am. Dec. 145.[59] Miller is therefore not estopped by reason of his relationship to the defendant bank to set up and prove in the action brought by it against him, if he can, that the money in fact belonged to the plaintiff, and that he paid it over on demand prior to the commencement of such action.

The point in controversy is whether the money collected by him belonged to the defendant or to the plaintiff. If it was the property of the bank, Miller is liable to it, but if it belonged to the plaintiff, and he paid it over upon demand, such payment will be a complete defense to the law action. These are questions properly triable at law, and according to the procedure applicable thereto. We are of the opinion, therefore, that there is no equity in plaintiff's proceeding.

The decree is reversed, and the complaint dismissed.

[59] The agent is in the same position as a bailee. Biddle v. Bond, 6 B. & S. 225, 34 L. J. Q. B. 137, 11 Jur. N. S. 425, 12 L. T. 178, 13 W. R. 561 (1865). After notice of the claim of the third person it may be culpable for the agent to pay the money to the principal. Hunt v. Maniere, 5 N. R. 181, 34 Beav. 157, 34 L. J. Ch. 142, 11 Jur. N. S. 28, 73, 11 L. T. 723, 13 W. R. 363 (1864). In such case he should interplead his principal and the third person if he can, or take indemnity from one party and deliver to him who indemnifies him. Sims v. Brown, 64 N. Y. 660 (1876), affirmed 6 Thomp. & C. 5 (1875). Trover will not lie because the agent holds the property in dispute until the rights of the claimants are determined. Fletcher v. Fletcher, 7 N. H. 452, 28 Am. Dec. 359 (1835). In Wando Phosphate Co. v. Parker, 93 Ga. 414, 21 S. E. 53 (1893), it is held that the agent is not guilty of conversion if he delivers the property to his principal promptly, and before suit is brought by the third person, even though he had notice of the third person's claim.

III. Commingling of Funds or Property

ILLINOIS LINEN CO. v. HOUGH.

(Supreme Court of Illinois, 1878. 91 Ill. 63.)

Assumpsit by Hough, who had been manager and president of the Linen Company. Verdict for plaintiff for $15,000, and defendant appeals and assigns for error the giving and refusing of instructions, and that the verdict is not supported by the evidence.

Sheldon, J.[60] * * * The defendant asked the following instruction: "The court instructs the jury, that if you believe, from the evidence, that the plaintiff, while acting as president of defendant, drew certain drafts upon the treasurer of defendant for the payment of money to himself and other persons therein named, and signed the said drafts with the word 'president' appended to his name, and upon the face of said drafts, directed the same to be charged to the account of the defendant, and if you shall further believe, from the evidence, that the defendant paid the money on said drafts, then you are instructed, as a matter of law, that the fact of the plaintiff's so signing said drafts, and directing the amount thereof to be charged to the defendant, would not relieve him of his responsibility to account to the defendant for the amount of money so drawn by him, and the burden of proof is upon the plaintiff to show that he has applied all of said money so, as aforesaid, drawn from the treasury of the defendant, to the use of the defendant, and if he has failed to so satisfy you in relation to any of the said drafts, by a preponderance of evidence, then the defendant would be entitled to recover therefor from the said plaintiff"—which the court refused to give, but modified to the effect that the plaintiff could only be held to account for such money as the evidence showed he had drawn for his own use and benefit, or such as he had appropriated to his own use, and as thus modified gave the instruction—all which was excepted to.

There was a set-off in the case, on the part of the defendant, of moneys paid and advanced, etc., of a large amount. The evidence shows that the plaintiff had authority to draw upon the treasurer of the company for money. This he often did, and all his drafts were paid. Some of the money so drawn was for the use of the company, and some for his own use. All the drafts, however, with the exception of one or two, were signed "R. M. Hough, President," and were, upon their face, directed to be charged to the account of the Illinois Linen Company. The treasurer's office was in Chicago, and the factory of the company was at Roselle, some twenty-eight miles distant. The plaintiff's place of business was at the latter place, and

[60] Part of the opinion is omitted.

the treasurer, as may be supposed, could know nothing of the intended use of these drafts, except as appeared upon their face. Though the assertion is made that upon the face of many of the drafts it appeared that they were drawn expressly for the benefit of the company, upon examination of the portion of the record referred to in support of the assertion, we find but a single draft so showing.

There were one hundred and sixteen of these drafts thus drawn upon the company, amounting to the sum of $36,736.68. The plaintiff himself admits that certain ones of them, amounting to $10,520.58, were for his own individual account, and testifies: "I kept no account, record or memorandum of any individual transactions with the company, supposing it would be on the company books."

There was remissness of duty here, on the part of the plaintiff, in his manner of dealing with this large amount of the company's money, drawing it, as he did, from the treasury of the company, upon drafts with no trace upon them to show for whose use (his or the company's) they were drawn, and keeping no account or memorandum thereof, but leaving, for whose use the drafts were drawn, to be shown, as best might be, from memory.

It is ordinarily the duty of agents to keep regular accounts and vouchers of the business in the course of their agency, and if this duty is not faithfully performed, the omission will always be construed unfavorably to the rights of the agent, and care will be taken that the principal shall not suffer thereby. Story on Agency, § 332. In 1 Story's Eq. Jur. § 468, after observing upon the duty of agents to keep regular accounts and vouchers, it is remarked further: "Upon similar grounds, as an agent is bound to keep the property of his principal distinct from his own, if he mixes it up with his own the whole will be taken, both at law and in equity, to be the property of the principal, until the agent puts the subject matter under such circumstances that it may be distinguished as satisfactorily as it might have been before the unauthorized mixture on his part,—in other words, the agent is put to the necessity of showing, clearly, what part of the property belongs to him; and so far as he is unable to do this, it is treated as the property of his principal."[61]

Analogous to the mixture of property was this confusion of private and company uses of these moneys, admitting, we think, of the application against the plaintiff of a similar principle to the above. The drafts having been drawn, indiscriminately and undistinguishably, for private and company uses, we think the burden of distinguishing between them was imposed upon the plaintiff. He knew the purposes

[61] Yates v. Arden, Fed. Cas. No. 18,126, 5 Cranch, C. C. 526 (1838). A leading case is Lupton v. White, 15 Ves. 432, 10 R. R. 94 (1808), per Eldon, Lord Ch. See, also, Lord Chedworth v. Edwards, 8 Ves. 46, 6 R. R. 212 (1802), and Clarke v. Tipping, 9 Beav. 284 (1846). Every presumption will be against such an agent, and if he cannot render a clear account showing which is his and which his principal's property or funds, he will be denied his commission for his services. Gray v. Haig, 20 Beav. 219 (1854).

for which the drafts were drawn,—whether for his own or the company's use. The company, presumably, did not know, there being nothing in the form the drafts were drawn to give information.

We are of opinion that, at least under the facts of this case, the instruction, as drawn, should have been given, and that there was error in the modification of it.

The error in respect of instructions makes it unnecessary to consider the point as to the verdict not being sustained by the evidence.

The judgment will be reversed and the cause remanded.

MASSACHUSETTS LIFE INS. CO. v. CARPENTER.

(Superior Court of City of New York, 1870. 32 N. Y. Super. Ct. 734, affirmed 49 N. Y. 668.)

Action for balance of account alleged to be due from defendant as agent of plaintiff. Defense, that the moneys were embezzled by a clerk.

SPENCER, J. I have examined critically the findings of fact and law made by the referee in this case, and conclude they are fully supported by the evidence, and that the judgment in this action should be affirmed. This fact clearly appears from the evidence, and does not seem to be contested, "That the defendant mixed the money and funds of the plaintiffs with moneys and funds of his own and of third parties, at the office and the bank, and that the money embezzled by the clerk was taken from these moneys and funds, which were so mixed and commingled that it is impossible to determine to whom the money embezzled actually belonged at the time." This action on the part of defendant made him liable to account to the plaintiffs for their moneys received by him, even admitting that a loss had occurred.[62]

By the act of defendant the identity of plaintiffs' moneys was lost, and the loss should fall upon the defendant, as Story justly remarks, "as a sort of penalty" for the agent's negligence in not keeping his principal's money separate from his own and that of others. When he chose to mingle these funds of the plaintiff with his own, etc., he made the same substantially *his own,* and incurred the liability and duty of answering to the plaintiffs for the full amount of the same. A loss of a part of these joint and mixed funds must be sustained wholly by the defendant.

The judgment should be affirmed, with costs.

[62] The agent does not, in general, insure the money or property intrusted to his care. Louisville & N. R. Co. v. Buffington, 131 Ala. 620, 31 South. 592 (1902).

MILLER v. CLARK.

(Supreme Court of New York, 1871. 5 Lans. 388.)

Appeal by defendant from a judgment entered in favor of plaintiff, upon the report of a referee, on an action for money had and received by defendant of the plaintiff.

JOHNSON, J.[63] * * * The defendant was the plaintiff's agent, and received the money, and property to be converted into money, to pay, lay out and expend in the plaintiff's business. He did, as all the evidence shows, and as the referee must have found in substance, so pay, lay out and expend nearly, if not quite, all the moneys he so received.

An agent receiving the money of his principal to be used and expended in his principal's business, does not, by receiving, keeping and expending it, in the manner contemplated, become the debtor of his principal in any legal sense. He is liable to account for all the funds so received; but as long as he fulfills and performs strictly his duties and obligations to his principal as agent, he is neither debtor to such principal, nor liable to be charged with interest for the moneys which have come to his hands in that capacity.

If an agent mixes the money of his principal with his own and makes use of it, he is liable to pay interest upon it from that time; or if he uses it separately and makes a profit upon it, or puts it to interest while in his hands, the principal is entitled to such profit or interest.

But as a general proposition, an agent is not liable to be charged with interest upon moneys received and held by him for the use of the principal. In order to render him liable for interest, some other fact must be shown in addition to the mere receiving and retaining the money in his hands. Dunlap's Paley on Agency, 49, 50; Williams v. Storrs, 6 Johns. Ch. 353, 10 Am. Dec. 340.

The question upon which the right of a principal to charge his agent with interest on the funds in his hands depends, was not litigated before the referee, and there is neither evidence nor finding upon the subject. The charge of interest upon the several amounts from the time they were received by the defendant is without any foundation of fact to uphold it, and is an error of law.[64] The exception to such allowance is, therefore, well taken. * * *

[63] Part of the opinion is omitted.

[64] The agent is not chargeable with interest if he merely suffers the money to remain dead in his hands. Rogers v. Boehm, 2 Esp. 704 (1798), per Ld. Kenyon. He is chargeable, however, if he deposits his principal's money in his own general bank account and draws out and uses it. Blodgett's Est. v. Converse's Est. 60 Vt. 410, 15 Atl. 109 (1888). Cf. Williams v. Storrs, 6 Johns. Ch. 353, 10 Am. Dec. 340 (1822), per Kent, Ch. And so he is if he keeps it against his principal's interest. Bischoffsheim v. Baltzer (C. C.) 21 Fed.

WHITECOMB v. JACOB.

(Court of Chancery, 1711. 1 Salkeld, 160.) [65]

If one employs a factor, and entrusts him with the disposal of merchandize, and the factor receives the money, and dies indebted (in) to debts of a higher nature, and it appears by evidence that this money was vested in other goods, and remains unpaid, those goods shall be taken as part of the merchant's estate, and not the factor's; but if the factor have the money, it shall be looked upon as the factor's estate, and must first answer the debts of a superior creditor, etc., for in regard that money has no earmark, equity cannot follow that in behalf of him that employed the factor.

VEIL & PETRAY v. MITCHELL'S ADM'RS.

(Circuit Court of the United States, Third Circuit, 1821. 4 Wash. C. C. 105, Fed. Cas. No. 16,908.)

The special verdict stated, that in the lifetime of Abner Mitchel, the intestate, the plaintiffs sent to him, for sale, two bills of exchange on France, with instructions to remit them the proceeds. The intestate sold the bills, and remitted to the plaintiffs the proceeds of one of them, except $60, which he had in bank notes of the South Carolina banks. For the other bill he took the check of the purchaser, payable some days after the sale. Before the check came to maturity, Mitchel died, leaving in his possession the check, and the South Carolina notes amounting to $60; all of which came to the hands of the defendants, who received payment of the check when the same became due. On another account, the plaintiffs were indebted to the intestate, in a balance of $344.82. The intestate died insolvent, and the question reserved for the opinion of the court is, whether the plaintiffs are entitled to recover the amount of the check, and the notes for $60, after deducting what is due to the intestate.

WASHINGTON, Circuit Justice. The cases upon this subject are uni-

531 (1884), and when he has failed for a long time to account, or has contracted to pay interest. Hauxhurst v. Hovey, 26 Vt. 544 (1854).

Set-off. While the agent sued for an accounting has a right of set-off for sums justly due him in the agency, he may not set off antecedent debts, outside the agency. Tagg v. Bowman, 108 Pa. 273, 56 Am. Rep. 204 (1885); Id., 99 Pa. 376 (1882).

[65] Accord: Scott v. Surman, Willes, 400 (1742). But money deposited in bank in the name of "W. & Co., Agt.," can be followed and recovered. Its identity is not lost. Baker v. N. Y. Nat. Bank, 100 N. Y. 31, 2 N. E. 452, 16 Abb. N. C. 458, 53 Am. Rep. 150 (1885); Id. 16 Abb. N. C. 458 (1885). It is not necessary to trace the identical coin or bills. Pearce v. Dill, 149 Ind. 136, 48 N. E. 788 (1897). Cf. with the above Fahnestock v. Bailey, 60 Ky. (3 Metc.) 48, 77 Am. Dec. 161 (1860), in which the property of the principal was bona fide sold and the money paid out before notice of the principal's claim, and Mobile & M. Ry. Co. v. Felrath, 67 Ala. 189 (1880), pointing out that money has no earmarks. See the discriminating discussion in Beatty v. McCleod, 11 La. Ann. 76 (1856).

form, in laying down the rule, that where the principal can trace his property into the hands of his agent or factor, whether it be the identical article which first came to the hands of the factor, or other property purchased for the principal by the factor with the proceeds; he may follow it, either into the hands of the factor, or of his legal representatives, or of his assigns if he should become insolvent or a bankrupt.[66] The factor is a trustee for the principal, so long as he retains the property, or its representative in his hands; and his assignees, or legal representatives take it, subject to the same trust, which they cannot defeat by turning it into money; unless indeed, they should pay it away in their representative character, before notice of the claim. It is in this point of view only, that notice is necessary. Judgment for plaintiffs.

CARTMELL v. ALLARD.

(Court of Appeals of Kentucky, 1871. 70 Ky. [7 Bush] 482.)

HARDIN, J. The appellee brought this action to recover of the appellants $1,215.83, for money received to the plaintiff's use, as the proceeds of the sales of one hundred barrels of flour consigned by the plaintiff at Paducah, Kentucky, to the defendants, in two parcels of fifty barrels each, and received by them for sale as commission merchants at Memphis, Tennessee; the first consignment being received January 17, 1868, and the last January 29, 1868, and both parcels sold, yielding together the amount claimed in the petition. It appears that the proceeds of sales of the flour as received were deposited by the defendants to their own credit in the Gayoso Savings Institution, a bank of recognized responsibility in Memphis; and on the 23d of January, 1868, they received from that bank, in payment of their own check on their deposits, a draft of the bank for $580.25 on the banking firm of Duncan, Sherman & Co., of New York; and on the 4th of February, 1868, they in like manner obtained the draft of the bank on Duncan, Sherman & Co. for $635.57. These drafts were both made payable to the plaintiff's order, and duly transmitted to and received by him; and it appears that on receipt of the first draft the plaintiff forwarded it to New York for presentment and payment, but that it was duly protested for nonpayment on the 5th of February, 1868, and returned to and received by the plaintiff at Paducah on the day of his receipt of the second draft; and therefore both drafts were remitted by him to the defendants,

[66] All that is required is that the property or money shall have some earmark or other appropriate identity. Whitley v. Foy, 59 N. C. 34, 78 Am. Dec. 236 (1860); Baker v. N. Y. Nat. Bank, 100 N. Y. 31, 2 N. E. 452, 16 Abb. N. C. 458, 53 Am. Rep. 150 (1885); Thompson v. Perkins, Fed. Cas. No. 13,972, 3 Mason, 232 (1823), per Story, J.

A third person bona fide taking property from the agent can get no better title than the agent had or was authorized to transfer. Stevenson v. Kyle, 42 W. Va. 229, 24 S. E. 886, 57 Am. St. Rep. 854 (1896).

with notice that he would look to them for payment of the proceeds of the flour.

Admitting the receipt and sales of the flour, the defendants by their answer relied on their transmission to the plaintiff of said drafts of the Gayoso Saving Institution as a performance of their undertaking as factors, and a bar to the action.

A trial of the cause by the court resulted in a judgment for the plaintiff for $1,215.83, from which this appeal is prosecuted.

The only material question to be determined is, whether, conceding the right of the appellants to remit the proceeds of the sales as received to the appellee by bank exchange according to what appears to have been the custom of commission merchants at Memphis, the act of depositing the money in the bank to their own credit, thus placing it beyond the control of the appellee, and creating a liability therefor of the bank to themselves, did not change the character of their responsibility to the appellee, from that which the law devolved on them as agents to that of his debtors for the funds so deposited.

It appears from the evidence the appellants deposited the money in the bank as their own, and it was placed to their general credit with the bank with other money previously deposited and subject to their drafts; and it is neither alleged nor proved that this disposition of the proceeds of the appellee's property was authorized by the terms of the appellants' agency, or any special direction of their principal. It is a general rule that if a trustee or agent makes an unauthorized investment or deposit of funds in his hands as such together with his own money in a common account with a banker, such a disposition will be treated as a conversion of the funds, and devolves on him any loss which may be sustained by the banker's insolvency (Story's Equity Jurisprudence, § 1270; Story on Agency, 208);[67] and no sufficient reason is shown in this case for exempting it from the operation of this rule.

Nor did the acceptance of the first draft sent to the appellee on Duncan, Sherman & Co., which was protested and returned, without laches on the part of the appellee, extinguish the pre-existing liability of the appellants. Hager v. Boswell, 4 J. J. Marsh. 62; Story on Bills of Exchange, § 109.

The second draft remitted to the appellee, not having been accepted, was properly returned by him with the previous one, which had proved fruitless as a payment.

Wherefore the judgment is affirmed.

[67] To make the principal liable for losses on bank failures the agent must deposit the money of his principal in a separate account. Webster v. Pierce, 35 Ill. 158 (1864). If an agent has funds for several principals the safer mode is to open a separate account for each one. Bank of Northern Liberties v. Jones, 42 Pa. 536 (1862).

IV. Mode of Remittance

WARWICKE v. NOAKES.[68]

(Court of King's Bench at Nisi Prius, 1791. 1 Peake, 98, 3 R. R. 653.)

Assumpsit for goods sold and delivered, and money had and received.

The plaintiff was a hop merchant, and the defendant his customer, living at Sherbourne in Dorsetshire. The plaintiff sold him hops, and also sold hops to several other persons in that neighbourhood; and requested the defendant (as his friend) to receive the money due to him from his other customers, and remit him by the post a bill for those sums, and also the money due to him from the defendant himself. A bill was accordingly remitted, but the letter got into bad hands, and the bill was received by some third person at the banker's on whom it was drawn.

Lord Kenyon. Had no directions been given about the mode of remittance, still this being done in the usual way of transacting business of this nature, I should have held the defendant clearly discharged from the money he had received as agent. It was so determined in the Court of Chancery forty years since: and as the plaintiff in this case directed the defendant to remit the whole money in this way, it was remitted at the peril of the plaintiff.

The plaintiff was nonsuited.

V. Form of Liability

MOORE v. McKIBBIN.

(Supreme Court of New York, 1860. 33 Barb. 246.)

Action for the conversion of horses belonging to plaintiff and sold by defendant. From judgment of non-suit plaintiff appeals.

Johnson, J.[69] The defendant, as appears from the evidence, had authority to sell the horses, but not at the price. He was to sell for not less than $500, and actually sold them for $200.

The case of Sarjeant v. Blunt, 16 Johns. 74, is directly upon the point that an action for the conversion of the property will not lie against an agent, for selling under the price fixed. The same rule is laid down in Cairnes & Lord v. Bleecker, 12 Johns. 300, though the point was not there decided. See, also, McMorris v. Simpson, 21

[68] Accord: Kerr v. Cotton, 23 Tex. 411 (1859). In the absence of instructions as to the mode of remittance the agent may properly conform to the usage in such cases. Potter v. Morland, 57 Mass. (3 Cush.) 384 (1853).

[69] Part of the opinion is omitted.

Wend. 610. This must be so upon principle, or else the purchaser would get no title. No one, I apprehend, would pretend that the purchaser did not get a good title, because the agent having power to sell, sold for a price something less than he was instructed to sell at. If the purchaser gets a good title, it must be upon the ground that the agent had the right to sell. If he could sell and transfer a valid title, the sale could not be tortious. The wrong in such a case consists, not in the act of selling, which is authorized, but in the breach of duty, in selling at the reduced and unauthorized price. It is not the want of authority, but the exercise of it contrary to the measure prescribed, which constitutes the wrong. The nonsuit at the circuit was therefore properly ordered; and a new trial must be denied. * * *

BARTELS v. KINNINGER.

(Supreme Court of Missouri, 1898. 144 Mo. 370, 46 S. W. 163.)

BURGESS, J.[70] This is a proceeding in equity by the plaintiff against John E. Kinninger and Alvina Kinninger, his wife, and A. G. Landgraf, to have set aside certain conveyances made by John E. Kinninger to them, and to subject the property described in the petition to sale under execution under a judgment held by plaintiff against John E. Kinninger. The property conveyed to the defendants Alvina Kinninger and Landgraf were separate and distinct tracts; the tract conveyed to Alvina Kinninger being the homestead of John E. Kinninger. The trial in the court below resulted in a judgment and decree in favor of plaintiff, and against John E. Kinninger and Alvina Kinninger, setting aside the deed from John to her, and in favor of Landgraf. John E. Kinninger and Alvina Kinninger appealed. No appeal was taken from the judgment in favor of Landgraf.

John E. Kinninger acquired the property involved in this appeal by deed from Aaron Abernathy and wife, on March 17, 1890, and filed the deed for record in the recorder's office of the county in which it lies, on the 6th day of May, 1890. Kinninger and wife occupied the property as their homestead from the time of this purchase, and were so occupying it at the time of the institution of this suit. * * * On January 1, 1890, and for a long time before that time, John E. Kinninger was the agent of his mother, the plaintiff, in loaning her money and collecting interest thereon. On that day he had on hand the sum of $2,533, which he received from her former agent, T. B. Whitledge. He continued to be his mother's agent until September 2, 1893, when they had a settlement; and plaintiff ascertained that he had used of her money the sum of $1,340 or $1,342, and, being unable to pay the same, he executed to her his note for that sum, upon which judgment was rendered in her favor for the sum of $1,413.57, in the circuit court

[70] Part of the opinion is omitted.

of Cape Girardeau county, at the May term, 1894. Execution was issued on this judgment July 21, 1894, which was returned unsatisfied, no property being found whereon to levy the same.

Defendants contend that the petition does not state facts sufficient to authorize the intervention of a court of equity, for the reason that it discloses upon its face that at the time that John E. Kinninger acquired the property in question, and occupied it as his homestead, he was not indebted to plaintiff in any sum of money whatever, but, on the other hand, he was her agent, and that that relationship continued to exist until this settlement, on September 2, 1893, when it was dissolved; that the relationship of principal and agent and of debtor and creditor cannot exist at the same time between the same parties, and as to the same subject-matter; and, as the deed from Abernathy to John E. for the homestead was recorded in the recorder's office of the proper county long before that time, that the homestead is not subject to levy and sale under execution for the payment of that debt. * * *

If John E. Kinninger acquired the property in question for a homestead, was occupying it as such, and had placed his deed thereto upon record, before the debt was contracted or the cause of action accrued upon which the judgment was rendered in favor of plaintiff against him, it was not subject to execution issued under that judgment; and, if exempt from execution, no fraud was perpetrated upon plaintiff by reason of the conveyance of it by him to his wife, Alvina, although the deed was without consideration. Davis v. Land, 88 Mo. 436. "Creditors have no interest in such property, as it cannot be subjected to the payment of their debts by proceeding in equity any more than it can be seized under attachment or execution." Bank v. Guthrey, 127 Mo. 189, 29 S. W. 1004, 48 Am. St. Rep. 621; Kendall v. Powers, 96 Mo. 142, 8 S. W. 793, 9 Am. St. Rep. 326; Holland v. Kreider, 86 Mo. 59. But, if subject to execution, the deed from Kinninger to his wife is fraudulent and void as against this plaintiff, because without consideration, and merely a voluntary conveyance. The question, then, is as to what time plaintiff's cause of action or the debt upon which the judgment was rendered accrued,—whether before or after the acquisition of the homestead. As a general rule, when money is placed in the hands of an agent to loan for a principal, the act of the agent in handling the money is the act of the principal, and, as to such money, the relation of debtor cannot exist, and only commences on the termination of the agency; but where the agent violates his instructions, as in this case, which were to loan the money on real estate, and, instead of so doing, converts it to his own use, a different rule prevails, and his principal may at once sue and recover it from him without demand. In Farrand v. Hurlbut, 7 Minn. 477 (Gil. 383), the plaintiff placed a sum of money in the hands of the defendant, to be loaned or invested by him in her name. He loaned it in his own name, and for his own use and benefit; and it was held that such act amounted to a

conversion, and the plaintiff could maintain action for the money and damages from the time of the conversion, without any demand. In Mechem, Ag. § 477, it is said: "The result of the authorities may be said to be that, if the agent parts with the property in any way or for any purpose not authorized, he is liable for a conversion."

The evidence showed that John E. Kinninger had converted a part of the money intrusted to him by his mother, to be loaned out for her upon real-estate security, to his own use, prior to the 8th day of January, 1890, the time that his deed to his homestead was recorded. Upon such conversion a cause of action at once accrued to plaintiff against him therefor,[71] and existed at the time of the acquisition of such homestead. Moreover, Kinninger tacitly admitted, by charging himself in the settlement between himself and his mother with interest amounting to $178 from January 1, 1890, to January 1, 1891, that he had converted about all of the money to his own use before the 8th day of January, 1890. The property is therefore not exempt from execution which may be issued on said judgment. * * *

VI. Necessity of Notice and Demand

BEDELL v. JANNEY.

(Supreme Court of Illinois, 1847. 9 Ill. 193.)

Suit by defendant in error for money collected for him by plaintiff in error, and not paid over.

Thomas, J.[72] * * * The plaintiffs' allegations were, that they had placed a demand due them in the hands of the defendant for collection; and that he had received the money on that demand, and appropriated it to his own use. The testimony corresponded with, and fully sustained these allegations.

It consisted of the defendant's admissions in writing, of his reception of the plaintiffs' demand for collection; of his receipt of money shown by parol evidence to have been collected thereon; and of a transcript from a justice's docket, showing the institution of a suit before such justice on said demand, and the proceedings thereon, to their termination in the execution on which the money was eventually collected, and paid over to defendant, and oral testimony explanatory of the documentary. It was, consequently, properly adjudged admissible,

[71] The principal has his election to sue on the agency contract or for conversion, but he cannot have the benefit of both in the same action. Nichols v. Gage, 10 Or. 82 (1881).

Mere failure of the agent to account for money collected for the principal is not conversion, unless it was his duty to hand over the identical money collected. Schanz v. Martin, 37 Misc. Rep. 492, 75 N. Y. Supp. 997 (1902). The agent is not, in general, required to hand over the specific proceeds. Walter v. Bennett, 16 N. Y. 250 (1857).

[72] Part of the opinion is omitted.

both upon the grounds of its relevancy and its competency. It proved everything alleged by the plaintiffs, and was therefore properly held sufficient to entitle them to a recovery.

Nor is this result varied by the fact that the commencement of the plaintiffs' suit was not preceded by a demand of payment from the defendant.[78] The doctrine contained in the instructions of the Circuit Court on this point is undoubtedly correct. A person is entitled to money collected for him by another so soon as received by the latter, and good faith on the part of the collector demands its immediate payment by him; but nevertheless, he is ordinarily not subjected to suit for his failure or omission to make such payment, until after demand therefor has been made of him. Tinkham v. Heyworth, 31 Ill. 519.

As a general rule in such cases, it may be presumed that payment has been delayed by reason of the want of safe and convenient means of transmission, or of some other good and sufficient cause, and that the recipient of the money, still considering himself as entitled to no more than enough reasonably to compensate him for his services in collecting it, will pay it over on demand. But, where so long a time has elapsed since the collection of the money, as to rebut any such presumption in favor of the collector, he may well be considered as having appropriated it to his own use, and then, neither law nor reason requires that before he can be sued for his non-feasance, he should be requested to do what his conduct sufficiently indicates his determination not to do.

The circumstances of the case at bar establish for it peculiar claims to exemption from the operation of the general rule referred to, as regulating the liabilities of collectors. The defendant had been so long the recipient of the plaintiffs' money without accounting to them for it, or being called upon by them to do so, that when, at length, they endeavored to collect it from him by suit, he claimed that time had absolved him from his liability; that the Statute of Limitations had afforded the privilege of a repose, not to be disturbed by having obtruded upon him this outlawed claim of his employers. The Court might, therefore, well submit it to the jury to say whether there had not been such an appropriation by the defendant of the plaintiffs' mon-

[78] Demand and refusal constitutes evidence of conversion. When the conversion can be shown in some other way no demand need be made. Nading v. Howe, 23 Ind. App. 690, 55 N. E. 1032 (1900). See, also, Wiley v. Logan, 95 N. C. 358 (1886), in which it is said: "A demand previous to bringing an action for money collected by an agent, is to enable the latter to pay it over without incurring the cost of suit, for the principal must seek him and not he the principal. Potter v. Sturges, 12 N. C. 79 (1826); Moore v. Hyman, 34 N. C. 38 (1851); Hyman v. Gray, 49 N. C. 155 (1856); Kivett v. Massey, 63 N. C. 240 (1869). But a demand is not required where the agency is denied, or a claim set up exceeding the amount collected, or the agent's responsibility is disputed in the answer. Waddell v. Swann, 91 N. C. 108 (1884), and cases cited in the opinion."

The situation of the parties and of the contract of agency may determine whether demand before suit is necessary. Clark v. Moody, 17 Mass. 145 (1821).

ey to his own use as to deprive him of the right to a demand of payment before the commencement of proceedings against him for its legal coercion. And well might the jury respond affirmatively to that proposition, and say, as by their verdict they did say, that there had been so unreasonable and vexatious a delay of payment, on the part of the defendant, as to entitle the plaintiffs to recover not only the amount collected by the defendant for their use (after deducting therefrom a reasonable compensation for his services), but also interest thereon.

This view of the subject is fully sustained by authority, so far as the right to commence suit without a previous demand is concerned. Hawley v. Sage, 15 Conn. 52; Estes v. Stokes, 2 Rich. 133; Richards v. Killam, 10 Mass. 244; Graves v. Ticknor, 6 N. H. 541.

The right to a recovery of interest in such cases as the jury found the case at bar to be, is expressly given by our statute. Rev. St. c. 54, § 1. Upon this question of interest, see, also, the case of Pease v. Barber, 3 Caines, 266. * * * Affirmed.

MODERN WOODMEN OF AMERICA v. COLMAN.

(Supreme Court of Nebraska, 1903. 68 Neb. 660, 94 N. W. 814.)

AMES, C.[74] This cause is resubmitted after the allowance of a motion for rehearing. A statement of the facts will be found in the former decision, published in 64 Neb. 162, 89 N. W. 641. The employment in which the deceased was engaged at the time of his death was not prohibited by the contract of insurance, but it was stipulated that, if he should engage therein, he should forfeit his beneficiary interest, unless he should file with the head clerk of the order a written waiver of any liability by it for loss by death as a direct result of such occupation. He did not file such a document, but the clerk of the local camp, through an assistant, continued to collect the monthly assessments or dues, and to remit them to the head clerk, with full knowledge of the circumstances, for a period of three months, and until the death of the insured. Correctly speaking, the question is not whether the association, by this conduct of its agent, waived a forfeiture, but whether it waived the waiver required of the insured. * * *

The certificate held by Colman was not void, but voidable. It was optional with him to continue it in force by filing a written waiver, and it was optional with the association so to continue it without such waiver. He was not delinquent of dues or assessments, or otherwise liable to suspension. The association acted through its agents, and, being a corporation, it could not act by other means. It demanded,

[74] Part of the opinion is omitted.

received, and retained his assessments with full knowledge of all the circumstances until after his death. It cannot be supposed that it intended to take and keep his money without consideration. The knowledge of its agent, authorized to make the collection, was the knowledge of the company of all the circumstances under which the payments were made. This is not the same as saying that the agent waived the forfeiture. It was waived by the association by taking and retaining the money of the insured with notice of all the facts within the knowledge of its agent. It is the duty of an agent to communicate to his principal all the facts concerning the service in which he is engaged that come to his knowledge in the course of his employment, and this duty, in a subsequent action between his principal and a third person, he is, with exceptions not necessary to be here noted, conclusively presumed to have performed. This is the foundation of the doctrine, necessary to the public safety, that notice to an agent is notice to his principal. Mechem on Agency, pars. 719, 720; Bradley, J., in Re Distilled Spirits, 11 Wall. 367, 20 L. Ed. 167.[75] * * *

It is recommended that the former decision of this court be adhered to, and the judgment of the district court affirmed.

DUFFIE, C., concurs.

PER CURIAM. For the reasons stated in the foregoing opinion, it is ordered that the former decision of this court be adhered to, and the judgment of the district court affirmed.

CLARK & CO. v. BANK OF WHEELING.[76]

(Supreme Court of Pennsylvania, 1851. 17 Pa. 322.)

Action by Bank of Wheeling against Clark & Co. for the amount of a bill of exchange, purchased by the latter, for the former and lost by reason of an error of Clark & Co. in informing the bank of the party to whom the bill was sent. On judgment for plaintiff defendant brings error.

LEWIS, J.[77] It is an agent's imperative duty to give his principal timely notice of every fact or circumstance which may make it necessary for him to take measures for his security. Paley, 38; Devall v. Burbridge, 4 Watts & S. 306. And if, by his neglect to do this,

[75] Accord: Pringle v. Mod. Woodmen of Am., 76 Neb. 384, 107 N. W. 756, 113 N. W. 231 (1906); The Distilled Spirits, 11 Wall. 367, 20 L. Ed. 167 (1870); post, p. 783. For the agent to fail to communicate the facts in order to take advantage for himself is a fraud upon his principal. Snell v. Goodlander, 90 Minn. 533, 97 N. W. 421 (1903).

[76] Followed in Moore v. Thompson, 9 Phila. 164, 30 Leg. Int. 4 (1873) in which the agent was held liable for losses due to the agent's failure to give the principal notice of attachment proceedings.

[77] Part of the opinion is omitted.

the principal has suffered a loss, he is entitled to be indemnified by the agent. Brown v. Arrott, 6 Watts & S. 416. In a case of this kind Mr. Justice Kennedy considers it just and reasonable that the agent "should be held responsible *for any loss that has happened, which possibly might have been avoided, had he only performed his duty to the principal as his agent.*" And where goods or funds are placed by the agent in the hands of a sub-agent, and the former is guilty of gross negligence (in withholding information), the same careful and considerate judge was of opinion that it "would not be going too far to hold that the agent, by his conduct, had impliedly agreed to be answerable for any loss that should arise from the default of his sub-agent." Brown v. Arrott, 6 Watts & S. 421.

If these principles be correct in the case of an ordinary agent for the sale of goods, their application to an agency like the one before us (for purchasing and remitting drafts on Philadelphia and New York, on account of a bank in the interior) is demanded by the true interests of trade, and the urgent necessities of financial credit. And if a measure of liability so stringent as that just indicated be appropriate, where there is only a *nonfeasance,* how just and necessary is its application to an act of positive *malfeasance.* In the use of that term, as applicable to the conduct of the defendants, we are far from imputing to them an intention to deceive or otherwise to wrong the plaintiff. But it was their duty to give information *immediately* and *accurately,* of the destination of the bill of exchange which had been purchased with the funds of the plaintiff; and the statement that it had been sent to E. W. Clark & Co. of Philadelphia (when in fact it had been forwarded to John T. Smith & Co. of New York), was such a misrepresentation of a material fact as fully authorized the plaintiff to consider the funds still in the hands of the defendants; or in other words, to hold them liable for all loss occasioned by the default of John T. Smith & Co. Until the plaintiff was advised of the remittance of the draft to Smith & Co., the insolvency and default of the latter stood at the risk of the agent, whose gross neglect and positive misstatement of the facts had deprived the bank of all power to protect its own interest. * * *

Judgment affirmed.

TEASLEY v. BRADLEY.

(Supreme Court of Georgia, 1900. 110 Ga. 497, 35 S. E. 782, 78 Am. St. Rep. 113.)

Laura Sadler sued her sister's husband, defendant Teasley, for an accounting of moneys from time to time put in his hands to be loaned and rents collected from land of the estate of her father and a deceased sister. She had for 44 years lived in defendant's home, and had worked there, calling for no accounting until shortly before instituting this

suit, which resulted in a judgment in her favor. A new trial being denied, defendant sued out a writ of error, but plaintiff died before the case was called, and her administrators were made parties to the suit.

COBB, J.[78] * * * 1. As long as a person who is in possession of the property of another, using the same for the owner's benefit, recognizes the latter's ownership, no lapse of time will bar the owner from asserting his title as against the person in possession. Before any lapse of time will be a bar to the owner, it must appear that the person in possession has given notice, or there must be circumstances shown which would be equivalent to notice, to the owner that the person in possession claims adversely to him. In such a case the statute will begin to run from the date of such notice. Until the owner has such notice, he has the right to treat the possession of the other person as his own. Keaton v. Greenwood, 8 Ga. 97. This is the principle at the foundation of that familiar rule now embodied in section 3198 of the Civil Code that "subsisting trusts, cognizable only in a court of equity, are not within the ordinary statutes of limitation." Chancellor Kent, in Kane v. Bloodgood, 7 Johns. Ch. 90, 11 Am. Dec. 417, states the same rule in the following language: "The trusts intended by the courts of equity not to be reached or affected by the statute of limitations are those technical and continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar, and exclusive jurisdiction of this court."

Although the rule just stated is applicable in terms alone to cases of technical trusts which are cognizable only in a court of equity, the principle upon which it is founded is applicable in some cases where a technical trust had not been created; the principle being, as above stated, that, as long as one recognizes that property in his possession belongs to another, the latter has the right to treat the possession as his own. The factor in possession of funds belonging to his principal, when there is nothing in the contract or the custom of the place requiring that the funds should be paid over at any particular time, cannot set up title to such funds without notice to the principal that he no longer holds the same for his benefit; and the statute of limitations does not begin to run in his favor until such notice, or there are circumstances equivalent to notice, or until there has been a demand and refusal to pay, or there has been an account rendered, accompanied by an offer to settle. In England a similar rule has been applied in the case of bailiffs and stewards who collected rents and held the same subject to the order of their principals. The rule was also applied in cases of agents having possession of the funds of the principal, when, as in the case of factors, neither under the contract nor the custom of the trade, the money was to be paid over at any particular time. In all such cases the property in the hands of the factor, bailiff, steward,

[78] Part of the opinion is omitted.

or agent, as the case might be, is treated as the property of the principal, and the possession of the agent is the possession of the principal; and no right of action accrues in favor of the principal until a demand and refusal, or a notice, or what is equivalent thereto, that the agent is holding adversely; and not until the right of action accrues does the statute of limitations begin to run in favor of the agent. This rule is in some cases subject to the exception that after the lapse of a reasonable time a demand will be presumed, and the statute of limitations will begin to run from the time such demand would be presumed to have been made. See, in this connection, 1 Wood, Lim. Act. (2d Ed.) § 123; 2 Perry, Trusts (5th Ed.) § 863; Mechem, Ag. § 533; Oliver v. Hammond, 85 Ga. 323, 331, 11 S. E. 655; Patterson v. Blanchard, 98 Ga. 518, 25 S. E. 572; 27 Am. & Eng. Enc. Law (1st Ed.) p. 100 et seq.; Blount v. Beall, 95 Ga. 182, 22 S. E. 52. Where one receives money from another from time to time, to invest, and collect the principal or interest, and reinvest the same from time to time for the benefit of another, and it is contemplated by the agreement between the parties that the person receiving the money shall use the same for the benefit of the other, and there is no time specified when the money is to be returned, such person would hold the same subject to the demand of the other, and no limitation would run against the person owning the fund in favor of the one who had collected it until there had been a demand and refusal, or there had been such a lapse of time as the law would presume a demand and refusal, or until an account had been rendered accompanied by an offer to settle, or the one in possession notified the owner that he no longer held it as the owner's but claimed title to it himself.

Applying this rule to the allegations of the present petition, there was no error in overruling the demurrer, so far as it raised the point that the plaintiff's cause of action was barred by the statute of limitations, and that the demand of the plaintiff had become stale. The amendment to the petition merely amplified the allegations in the original petition, and was, therefore, not subject to the objection raised in the demurrer thereto that it set forth a new and distinct cause of action. The relation existing between plaintiff and defendant was not such that a technical, subsisting trust cognizable only in a court of equity would result therefrom, and for this reason the provisions of the Code (Civ. Code, §§ 3149, 3153) requiring express trusts to be declared in writing, and prohibiting the creation of such a trust in favor of a person sui juris who is laboring under no disability, have no application in the present case. While such a trust was not created, and not intended to be created, between the parties, the same principles which are at the foundation of the rule which prevents a trustee in a technical trust from pleading the statute of limitations against the claim of the cestui que trust would prevent an agent, of the character that the allegations in the petition make the defendant, from relying upon

the statute of limitations as a defense until there had been an account rendered, accompanied by an offer to settle, a refusal, upon demand, to settle, an express repudiation of the agency, or such a change in the relation between the parties as would be sufficient to put the principal on notice that the agency was no longer recognized. As an instance in which this rule was applied, where no express trust existed, see Oliver v. Hammond, supra. Until one or the other of these contingencies happened, the possession of the defendant was the possession of the plaintiff, and no limitation of time would operate to debar the latter from calling the former to account, with the single exception that, if the nature of the transactions was such that after the lapse of a reasonable time the law would presume a demand and refusal, then the statute would begin to run from the date such demand would be presumed. If the relation which the defendant bore to the plaintiff was that of a confidential continuing agent, no such presumption would arise until such relation ceased. The evidence introduced in behalf of the plaintiff tended to establish the allegations in the petition as to the character of the agency under which the defendant managed and controlled the funds of plaintiff, and, such evidence, as a whole, being sufficient to authorize a recovery by the plaintiff of at least a portion of the amount claimed by her, there was no error in overruling a motion for a nonsuit. Certain portions of the charge, made the subject of assignments of error in the motion for a new trial, were substantially in accord with what is now ruled, and were, therefore, not erroneous.

2. The defendant contended that, if he occupied the relation of agent at all to the plaintiff, he was simply her agent to collect her money, and that in such a case the statute of limitations would begin to run in his favor certainly from the time that the principal had knowledge that the agent had made the collection. When an agent is appointed for the sole purpose of collecting and paying over money, the statute of limitations begins to run in favor of the agent from the time that the fact that the collection had been made came to the knowledge of the principal. Schofield v. Woolley, 98 Ga. 548, 25 S. E. 769, 58 Am. St. Rep. 315. There being positive evidence introduced in behalf of the defendant that as to some of the items with which it was sought to charge him the sums came into his hands under authority simply to collect and pay over, it was error to refuse, at his request, to give an instruction to the jury embodying the principle above referred to.[79] * * *

For this and other errors, reversed.

[79] Accord: Burdick v. Garrick, L. R. 5 Ch. App. Cas. 233, 39 L. J. Ch. 369, 18 W. R. 387 (1870). The statute does not begin to run until there is a complete present cause of action. This requires notice, or conditions excusing notice, by the agent, and demand by the principal. The principal cannot, however, by failing to make a demand within a reasonable time, delay the operation of the statute. Jett v. Hempstead, 25 Ark. 462 (1869). A mere right to a thing does not constitute a cause of action. There must also be a wrong, in this case a failure by the agent to account after demand by the principal.

CHAPTER II

DUTIES AND LIABILITIES OF PRINCIPAL TO AGENT

SECTION 1.—COMPENSATION TO THE AGENT

I. General Rule

Succession of KREKELER.

(Supreme Court of Louisiana, 1892. 44 La. Ann. 726, 11 South. 35.)

Fenner, J. William Krekeler, the husband of Mrs. Lizette Krekeler, died on March 13, 1890, leaving an estate consisting of some movables and several houses and lots, valued altogether at $4,873.90, belonging jointly to his succession and his widow as partners in community. He left no forced heirs. Mrs. Krekeler was nearly 70 years old, in infirm health, weighing nearly 350 pounds, unaccustomed and unable to attend to business. She sent for an acquaintance, Charles Kummell, and asked him to take charge of her interest, and attend to her affairs and property, which he agreed to do. He attended to the opening of her husband's succession in her behalf as surviving wife, managed the property, attended to repairs, paid the taxes, collected the rents, and did all her business for her. As indicated, the property belonged to the community, and Mrs. Krekeler, under the law, would only have enjoyed the usufruct of the husband's half, which, at her death, would have passed to his heirs. But Mrs. Krekeler informed Kummell that her husband had made a notarial will in 1858. Search in his house and papers failed to find the copy. Attention was turned to notarial records. The counsel and notary of the succession made diligent search without avail. Mr. Kummell himself made active efforts to find it. After others had abandoned the search as fruitless, he discovered the will in the records of the notary, Coffey, indexed by mistake under the letter "C," instead of "K." The will made Mrs. Krekeler sole universal legatee. It was probated, and she went into possession of the entire estate as sole owner on the 4th of December, 1890. Very shortly afterwards—on 21st December, 1890—she died suddenly in church. Her succession was opened, and is under administration by the public administrator, to whom Kummell presented a bill for $500 for services and $22 for expenses. The administrator ad-

Only then will the statute begin to run. Auld v. Butcher, 22 Kan. 400 (1879). So when the agent has been guilty of fraud the statute runs from the time the fraud was, or by the use of reasonable diligence might have been, discovered. Faust v. Hosford, 119 Iowa, 97, 93 N. W. 58 (1903); McDowell v. Potter, 8 Pa. 189, 49 Am. Dec. 503 (1848).

mitted the claim, and placed it on his account. The heirs of Mrs. Krekeler opposed it, and from a judgment maintaining the opposition and rejecting the claim for services Kummell prosecutes this appeal.

The opposition came with a bad grace from the heirs who profited so directly by Kummell's services, and we think the judge erred in maintaining it. We cannot distinguish the case from Waterman v. Gibson, 5 La. Ann. 672, where we said: "It is said that a contract of mandate is presumed to be gratuitous, unless there have been a contrary agreement. Under our Code, which has modified the principles of the Roman law, it is not of the essence of mandate that it be gratuitous; and, in our opinion, it is not necessary for an agent to establish an express agreement that he should have a pecuniary remuneration for his services. Courts may infer such an agreement from the nature of the employment and the relations of the parties. It would be unreasonable to look upon the undertaking of the defendant as a mere office d'ami." See, also, Succession of Fowler, 7 La. Ann. 207; 3 Baudry, Lacantinerie No. 908; 27 Laurent, No. 346.[1] This record exhibits no relations between Kummell and the deceased except those of long acquaintance. He is not shown to have been a relative, or even a very close friend, or to have been under any obligations of any kind, or to have derived any advantage from his employment. Aside from such relations, the services are certainly of a character which no person would be expected to render gratuitously. There is nothing in the evidence intimating that either party expected or intended that they should be gratuitous. The sudden death of Mrs. Krekeler, before any occasion for a settlement had arisen, robs of significance the failure to make the claim during her lifetime. We see no reason to doubt that, had she lived, Mrs. Krekeler expected to pay, and would have paid, a reasonable compensation for these services. Considering, however, the value of the estate, and that its entire revenues for the time of services did not exceed $500, we are disposed to think the charge somewhat

[1] In Martin v. Roberts (C. C.) 36 Fed. 217 (1888), Simonton, J., thus stated the rule: "In the transactions of commerce time is money. In business there is no place for sentiment. No services are gratuitous, not expressly declared so. 'In the ordinary course of commercial agencies a compensation is always understood to belong to the agent, in consideration of the duties and responsibilities which he assumes, and the labor and services which he performs.' Story, Ag. § 326; Bish. Cont. § 219, and cases quoted; Id. § 220, and cases quoted; 3 Add. Cont. § 1401. In the case of Ravenel v. Pinckney's Assignee, 'factors, commission merchants, commercial agents, and assignees are held entitled to compensation from the usages of trade;' that is to say, by immemorial usage it is distinctly understood that all persons engaged in commerce, called upon to do services in the due course of business, are ex necessitate entitled to compensation, as growing out of, and inseparably connected with, the contract of their employment. I am of the opinion that the defendant is entitled to compensation for his services, and that this was in contemplation of both parties in the creation and progress of the agency. He cannot be deprived of this, unless it be shown by the testimony that he has released, waived, or surrendered it for a consideration. This does not appear."

See, also, Weston v. Davis, 24 Me. 374 (1841).

excessive, and that an allowance of $300, in addition to the expenses, will suffice. We have considered the suggestion as to our jurisdiction, but think it disposed of by our decision in Brierre v. Creditors, 43 La. Ann. 423, 9 South. 640.

It is therefore ordered and decreed that judgment appealed from be amended by increasing the amount allowed Charles Kummell from $22 to $322, and that, as thus amended, the same be affirmed, appellees to pay cost of appeal.

LOCKWOOD v. ROBBINS.

(Supreme Court of Judicature of Indiana, 1890. 125 Ind. 398, 25 N. E. 455.)

MITCHELL, J.[2] Leon Robbins filed a claim for three years and six months' work and labor against the estate of Alonzo Lockwood, deceased. * * *

The material facts as returned in a special verdict were that the plaintiff, a minor about 12 years old, without father or other guardian, entered the decedent's service in 1876, and continued therein until March, 1880, during which time he performed service for the latter at his instance and request, of the value, after deducting board, clothing, washing, and mending furnished by the decedent of $80. The services were not performed under any contract between the plaintiff and decedent, nor between the latter and any other person authorized to contract for the plaintiff. Upon the facts found, the court very properly entered judgment for the plaintiff. It does not appear that the plaintiff was taken into the decedent's family and cared for and treated as a member thereof. On the contrary, he entered his service and performed labor at the decedent's instance and request, and, although there was no special contract for remuneration, the law raises an implied obligation to pay what the services were reasonably worth. Gerard v. Dill, 96 Ind. 476. Where one is taken into the family of another, and is regarded and treated in every respect as a member of the household, then, even though there may be no ties of blood, there is no implied obligation to pay for services rendered on the one hand, nor for board furnished on the other. Brown v. Yaryan, 74 Ind. 305, and cases cited; Marquess v. La Baw, 82 Ind. 550; Wright v. McLarinan, 92 Ind. 103. The present is, however, not such a case.

The judgment is affirmed, with costs.

[2] Part of the opinion is omitted.

WALLACE v. FLOYD.

(Supreme Court of Pennsylvania, 1857. 29 Pa. 184, 72 Am. Dec. 620.)

ARMSTRONG, J. Nathan Floyd, who was plaintiff below, brought suit against W. W. Wallace, for three years and three months' services as clerk at Iron City Furnace. He declared in assumpsit in the common counts and on a quantum meruit. The pleas were non assumpsit, payment, etc. The cause was arbitrated, and an award filed in favour of plaintiff for $299.14, from which he appealed, and on a trial in court obtained a verdict for $650. The defendant, Wallace, moved for a new trial, and on the 17th of March, 1854, after argument, by consent of counsel, on payment of the amount of the award, with interest and costs, the verdict was set aside as to the residue of plaintiff's claim, and defendant let into a defence as to the *value of plaintiff's services.*

The cause again came on for trial, and in the course of it, the defendant, Wallace, alleged and proved a special contract at $300 per annum. And prayed the court to instruct the jury:

1. That if the jury believe that the plaintiff engaged to serve the defendant at a fixed salary per year, he cannot recover more than the amount agreed upon.

2. That if defendant made a bargain at a fixed sum, and continued till he left without a special bargain to raise his salary, he is bound by his original contract; the presumption being, that he continued under the same contract.

To these points the court answered:

"We decline to charge as requested in the foregoing points. When the verdict was set aside, it was on terms that the defendant might take defence as to the value of the plaintiff's services. That is the issue in this case. The jury will determine from the whole evidence what was the value of the plaintiff's services."

It is very true, as contended for, that courts in granting new trials, have a right to make terms. The terms usually made are such as relate to the payment of costs, the compliance with rules of court, or with some stipulation not affecting the merits of the controversy. But to make terms which would change the nature of a contract, or shut out the evidence necessary to support it, might be an exercise of power not calculated in a very high degree to promote the interests of the parties. When, however, the terms on which a new trial is granted, are spread on the face of the record, their meaning is not to be gathered from any latent intention that may have existed, but from the import of the language used. It is admitted by the argument of the counsel for the defendant in error, that the points submitted on the part of Wallace, as abstract propositions, are correct, but it denies their application to this case. He insists that according to the terms of the order granting a new trial, the issue was "as to the value of the plain-

tiff's services." That the question was not how much Wallace agreed to give, or Floyd proposed to take, but simply how much the services were worth independent of the contract. And the error of the court was in thinking with the claimant's counsel. The terms of the order did not restrict or prescribe the mode or kind of proof by which the value of the services was to be ascertained. I know of no standard of value that could be more satisfactory than that which the parties fix for themselves; and where there is a special contract, fixing the terms and conditions on which one party shall serve another, in the absence of proof rescinding or altering it, it is conclusive. If a tenant holds over without notice to quit, or a new contract, the terms and conditions of his old lease will govern. So, if a man agree to serve another for a month or year, at a stipulated sum per month or year, and silently continues longer in the service, it will be on the old terms. If there was a special contract existing, it was the duty of Floyd to give notice to his employer if he wished to alter or enlarge its terms; and it would then have been incumbent on Wallace to accede to the demand or terminate the service. The court said in answer to the defendant's offer, "The inquiry is as to the value of plaintiff's services, and not as to the contract price; and, so far as the evidence may tend to show their value, it is admitted." From this the jury might very readily suppose that the "contract price" was excluded, and that it was only the *other evidence* in the cause from which they could fix the value.[3] If no contract was proved, this might be correct. But if there was a special agreement, as is alleged, not changed or rescinded, it would control; and it was error to mingle it with other evidence to enhance the value.

Judgment reversed and venire de novo awarded.

MILLAR v. CUDDY.

(Supreme Court of Michigan, 1880. 43 Mich. 273, 5 N. W. 316, 38 Am. Rep. 181.)

MARSTON, C. J. We have been unable to discover any error in this case. The conversation that took place between Brace and one of the plaintiffs was clearly admissible in evidence. It was the commencement and a part of the conversation or negotiations which led to the employment of the defendant in error. It had a tendency to show that a fixed amount was to be paid, and was admissible in any view of the

[3] When the contract stipulates the compensation of the agent it is error to instruct the jury that the agent may recover what his services are reasonably worth, McCormick & Bro. v. Bush, 47 Tex. 191 (1877); or to admit evidence as to the reasonable value of the services rendered, Hamilton v. Frothingham, 59 Mich. 253, 26 N. W. 486 (1886). Usage and custom cannot prevail against the stipulations of the agency contract. Bower v. Jones, 8 Bing. 65, 21 E. C. L. 447 (1831).

case. On the other hand the defendants below denied that any sum was agreed upon, but that they were to pay him what they thought he was worth to them. This could not mean that they could, after the services had been performed, fix the compensation at such sum as they pleased. Parties may make such an agreement, but we think this language does not warrant any such view. If no agreement as to compensation was made, then the law would imply that they should pay what his services were reasonably worth,[4] and the court so instructed the jury. There was no error in the court permitting the jury to take to their room the computation made by the plaintiff's attorney. It was but an aid to the jury in estimating the amount due the plaintiff, if they found his theory of the case to be correct. They were in no way bound by it, and they could not consider it as evidence or be misled thereby. To permit the jury to take such a paper was but in accordance with long, well settled practice, and was unobjectionable.

The judgment must be affirmed with costs.

The other Justices concurred.

VILAS v. DOWNER.

(Supreme Court of Vermont, 1849. 21 Vt. 419.)

Book account for services by plaintiff as attorney for defendant in sundry suits. Defendant claimed plaintiff's charges were unreasonably high.

POLAND, J.[5] * * * From the report of the auditors in this case we think it is apparent, that they allowed the plaintiff's charges, as they were presented before them, solely upon the ground, that they were charged according to his usual and customary rule of charging for his professional services, without reference to their being reasonable, or that they had been acquiesced in or assented to by the defendant. This, then, presents the question, as to what should be the rule of compensation for the services of an attorney, who is employed by a client to manage a suit, without any special agreement as to the amount of his charges for such service.

In England, and in some of the neighboring states, such questions cannot well arise, because the bills of attorneys for services for their clients are always settled by a taxation, to be made by a master, or prothonotary, of the court; and, in actions to recover for their services, the amount is fixed by such taxation. But in this state we have no such practice; and attorneys are left, in common with every other class of citizens, who bring suits to recover the price of their labor, to commence their suits and have not only their right but amount of re-

[4] Such a promise, however, is implied only when there is no express agreement as to the amount of the compensation, Weston v. Davis, 24 Me. 374 (1841).

[5] Part of the opinion is omitted.

covery determined by a jury, or by auditors, according to their choice of actions. What rule, then, should govern the triers, in fixing the amount of damages to be awarded to a plaintiff in such a case? In all other cases of employment, or hiring, where no stipulation is made as to price, the law implies a promise, or agreement, on the part of the employer, to pay the person employed such sum, as his services are reasonably worth, or as he reasonably deserves to have; and on the purchase of goods, without express stipulation as to price, the purchaser is only bound to pay what the goods are reasonably worth.

We are not able to find any reason, or authority, to distinguish the rule in relation to the employment of lawyers from that which obtains in every other employment for service. It must of course be more difficult, often, to determine what the sum should be, for service, the value of which depends much upon professional skill and learning, than in the case of mere mechanical or physical labor; but after all we think the same principles must govern both, and that in this case the auditors should have examined the plaintiff's charges, and allowed him what he reasonably deserved, with a proper reference to the nature of the business performed by him for the defendant, and his own standing in his profession for learning and skillfulness, whereby the value of his services was enhanced to the defendant.

For the purpose of aiding in the determination of the value of the plaintiff's services, we think it was proper for the auditors to receive evidence of the usual prices charged and received for similar services to those rendered by the plaintiff for the defendant by other men of the same profession with the plaintiff, in the same vicinity, and in the same courts; and that the evidence offered by the defendant for that purpose, and which was rejected by the auditors, should have been received. Such evidence could not, from the nature of the case, furnish an exact and certain rule to determine the amount of the plaintiff's charges; as other cases, precisely like those of the defendant, might not be frequent, and other attorneys of precisely equal professional reputation and skill with the plaintiff might not be found in the vicinity; but we think such evidence would afford an approximation to the true rule to govern the plaintiff's charges. In all ordinary cases, in determining the value of services, evidence is received of what is commonly and usually charged by other persons for the like services; and in determining the value of goods, evidence is received of what similar articles are bought and sold for, in order to ascertain their value in market;[6] and in our opinion the price of a lawyer's professional labor must be ascertained and determined by the same rule. It would be wholly unjust, to require a person employing a lawyer to manage a suit, (where of course it could not be known to either party, how long it would continue in court, or the amount of professional labor, which

[6] Whenever the agency contract fails to fix the amount of the agent's compensation evidence should be admitted to show its reasonable value. Toomy v. Dunphy, 86 Cal. 639, 25 Pac. 130 (1890).

would be required to carry it through,) to stipulate as to the amount of his charges, or else be compelled to pay such charges, as the lawyer should see fit to make against him. * * *

Judgment reversed and case recommitted.

HARRISON v. GOTLEIB.

(Circuit Court of Ohio, First Circuit, 1888. 3 Ohio Cir. Ct. 191, 2 Ohio Cir. Dec. 109.)

SMITH, C. J.[1] * * * The action was brought by Gotleib against Harrison to recover what he claimed was the value of services rendered by him in effecting a lease by Harrison of certain real estate to Isaac Failer Sons; and his employment was denied by Harrison, or that any services were rendered for which the latter was liable to pay.

It is conceded that the evidence tends to show this state of facts, there being no great controversy as to any one point. Gotleib was not a real estate broker, and had never been engaged in that business. He was on intimate terms with Isaac Failer Sons, a firm doing business at the foot of Main street, and made his headquarters at their store. He knew of their desire to purchase or lease property for their business higher up in the city, and on a casual walk with some of the members of the firm, he noticed a piece of property on Vine street, owned by Mr. Harrison. After this, apparently of his own motion, he sought the acquaintance of Mr. Harrison (they being strangers to each other), and spoke to him of this property, and told him he had friends who were looking for a location, and that this might suit them. Harrison asked who they were, and on being told, said: "Bring your friends to see me." No price for the property was spoken of, and no terms as to rental or purchase.

Gotleib does not claim that anything else of a material character took place at that time, or that he told Harrison that he was a broker, or that he would expect any commission or compensation if an arrangement was entered into between the parties, or that anything else was said or done to advise Harrison thereof, or to show that he had any idea that he (Gotleib) expected compensation.

Gotleib told Failer Sons what he had done, and they called upon Harrison, and their negotiations resulted after some time, in the erection by the latter of a storehouse upon this lot, and a lease of it to them for several years at a large rent. Gotleib, so far as Harrison knew, had nothing whatever to do with the negotiations, and nothing further passed between them on the subject till, as Gotleib says, just before the completion of the arrangement (Harrison says after it), he notified the latter that he would expect pay. Gotleib seems to have encouraged Failer Sons to make the lease, but was not employed by

[1] Part of the opinion is omitted.

them to aid in the matter, and received no compensation therefor from them.

There being no claim of an express employment of Gotleib, was there an implied contract that he was to be paid for his services by Harrison?

Blackstone, in vol. 2, 443, says: "Implied contracts are such as reason and justice dictate, and which therefore the law presumes that every man undertakes to perform;" and the question whether a liability is incurred by one person to compensate another for services rendered to him, in the absence of an express contract, is, in a multitude of cases, to be determined solely by the acts of the parties themselves, their relations to each other, and the peculiar circumstances which surrounded them at the time. For there can be no question, but that one person may render valuable services to another, with his knowledge and consent, and yet no obligation to pay therefor will arise, for the reason that neither of the parties intended it, or if the person rendering the service did intend to make a charge therefor, yet the circumstances may have been such that a person of ordinary judgment would not suppose that such a charge would be made, and the party receiving the service did not, in fact, so believe.

The authorities cited and relied upon by the defendant in error, we think, sustain this doctrine.

The case of Day v. Caton, 119 Mass. 513, 20 Am. Rep. 347, is one, the syllabus of which is this: "In an action to recover the value of one-half of a party wall erected by plaintiff, partly on his estate, and partly on that of the defendant, the jury may, in the absence of an express agreement as to payment on the defendant's part, infer a promise to pay, if the plaintiff undertook and completed the wall with the expectation that the defendant would pay him for it, and the defendant had reason to know, that the plaintiff was so acting with that expectation, and allowed him so to act without objection." And in the decision it is said, "that it is conceded to be the law, that a promise to pay for the party wall, would not be inferred from the fact (alone) that the plaintiff, with the defendant's knowledge, built it, and that the defendant used it.

And in Wald's Pollock on Contracts, page 11, the law is stated concisely thus: "If A., with B.'s knowledge, but without any express request, does work for B. such as people as a rule expect to be paid for, if B. accepts the work or its result, and if there are no special circumstances to show that A. meant to do the work for nothing, or that B. honestly believed that such was his intention, there is no difficulty in inferring a promise by B. to pay what A.'s labor is worth. And this is a pure inference of fact, the question being, whether B.'s conduct has been such that a reasonable man in A.'s position would understand from it that A. meant to treat the work as if done to his express order. The doing of the work with B.'s knowledge, is

the proposal of a contract, and B.'s conduct is the acceptance." Accepting this as the law, the question is, was it given substantially to the jury by the court?

An examination of the charge of the court leads us to the conclusion that it was not. While in one part of it there is a statement that if the services were rendered by Gotleib voluntarily, as a matter of accommodation, or a matter of kindness, to any person, or for Failer Sons, he could not recover, yet no stress is laid upon this, and in several places where the court seems to recapitulate, and to give the law which is to govern the jury, in substance it is charged that all that was necessary to entitle the plaintiff to recover, was that service should have been rendered to Harrison, and that he had the benefit of it, and knew that the service was rendered for him. All this might have been so, and Harrison not be liable at all. There are cases occurring continually, where one person renders valuable service for another, and the latter knows it and avails himself of it, and yet is not bound to pay for it. If the services are such as people ordinarily expect to be paid for, and there are no special circumstances to show that they were not in a particular instance, a promise to pay may fairly be inferred.

But we think, that under the circumstances disclosed in this case, where there was so little evidence on which a jury could properly find that services had been rendered by Gotleib to Harrison, the former intending to charge, and the latter to pay therefor, or to show a state of fact that would give rise to such a presumption, or that the service was really rendered for Harrison's benefit and not for the benefit of his own friends, that the defendant was entitled, on proper request therefor, to have the rule with the proper limitations which we have tried to state, given to the jury. This was attempted by the counsel for the defendant, but it was, as appears by the bill of exceptions, by asking a series of charges to be given as a whole, and it contained the statement that to entitle the plaintiff to a recovery he should have shown that he was a real estate broker, and that Harrison knew it. This was not good law—for others than professional brokers may, in proper cases, be entitled to compensation for services rendered in matters of this kind, and that without an express contract. In strictness, therefore, the court was justified in refusing to give the charge as a whole, though the other parts of it may have been entirely sound.

But we think the statement of the law as given by the court to the jury, was, under the circumstances shown, misleading and erroneous, in making the right of Gotleib to recover, to depend alone upon the question whether he rendered the services for Harrison and that the latter knew it. They should further have been instructed, that if the service rendered by Gotleib was such as people usually charge for (in this case a question of fact and not of law) and there was nothing disclosed which would show that Gotleib had not the intention of charg-

ing for it, or that Harrison might well believe that he was not to pay for such service, that they might properly infer a promise on the part of Harrison to pay.[8] This was not done, and for this reason we think the judgment should be reversed.

II. When the Agent Abandons the Agency

TIMBERLAKE v. THAYER.

(Supreme Court of Mississippi, 1893. 71 Miss. 279, 14 South. 446, 24 L. R. A. 231.)

Attachment against Vandiver and Trotter, makers, and Timberlake, indorser, of a promissory note. Case dismissed by plaintiff as to Vandiver and Trotter. Defendant claimed release by reason of a contract that plaintiff was to accept services from Vandiver in payment of the note. The trial court instructed the jury that if Vandiver made an entire contract for services, but abandoned the service without the fault or consent of Thayer before the expiration of a year, then Vandiver was entitled to nothing for the service actually rendered. From judgment for plaintiff defendant appeals.

COOPER, J.[9] If we were authorized to make the law, instead of announcing it as it is already made, we would unhesitatingly hold that one contracting to render personal service to another for a specified time could, upon breach of the contract by himself, recover from that other for the value of the service rendered by him, and received by that other, subject to a diminution of his demand to the extent of the damage flowing from his breach of contract. In Britton v. Turner, 6 N. H. 481, 26 Am. Dec. 713, Judge Parker demonstrates, in an admirable and powerful opinion, the equity of such a rule; and it was held in that case that such was the rule of the common law. The courts of some of the states have followed or been influenced by that opinion, and have overturned or mitigated the vigorous rule of the common law. Pixler v. Nichols, 8 Iowa, 106, 74 Am. Dec. 298; Coe v. Smith, 4 Ind. 79, 58 Am. Dec. 618; Riggs v. Horde, 25 Tex. Supp. 456, 78 Am. Dec. 584; Chamblee v. Baker, 95 N. C. 98; Parcell v. McComber, 11 Neb. 209, 7 N. W. 529, 38 Am. Rep. 366. But the decided weight of authority is to the contrary.[10] Lawson, Cont. Carr. § 470, note 4, and authorities there cited. And it was

[8] Accord: McLiney v. Gomprecht, 7 Misc. Rep. 169, 27 N. Y. Supp. 253 (1894).

[9] Part of the opinion is omitted.

[10] Accord: Stark v. Parker, 2 Pick. 267, 13 Am. Dec. 425 (1824), a leading case for the prevailing rule; Olmstead v. Beale, 19 Pick. 528 (1837); Miller v. Goddard, 34 Me. 102, 56 Am. Dec. 638 (1852); Nelichka v. Esterly, 29 Minn. 146, 12 N. W. 457 (1882). The rule has been vigorously assailed, especially in the leading case of Britton v. Turner, 6 N. H. 481, 26 Am. Dec. 713 (1834).

decided at any early day in this state that an entire contract of this character could not be apportioned, and that, under the circumstances named, no recovery could be had by the party guilty of the breach of contract; that he could not recover on the special contract, because he himself had not performed it, nor upon a quantum meruit, because of the existence of the special contract. Wooten v. Read, 2 Smedes & M. 585. In Hariston v. Sale, 6 Smedes & M. 634, and Robinson v. Sanders, 24 Miss. 391, it was held that an overseer's contract with his employer, though made for a definite time, was not an entire contract, and recoveries were allowed on the common counts. The cases relied on to support the rule announced in these decisions were Byrd v. Boyd, 4 McCord, 246, 17 Am. Dec. 740;

In approving this case, Cobb, J., in Parcell v. McComber, 11 Neb. 209, 7 N. W. 529, 38 Am. Rep. 366 (1881) says:

"There is an important question presented in this case, one upon which it cannot be claimed that the authorities, either as expressed in the opinions of courts or the treatises of text writers, are agreed. Until the last fifty years it was quite generally held to be the law, both in England and in America, that where a person, having agreed to work for another for a definite period of time, voluntarily leaves such service without any fault on the part of the employer, and without his consent, before the expiration of the term, he cannot recover in any form of action for the services actually rendered. The reasoning upon which the decisions holding this view were generally sustained is well expressed by Morton, J., in delivering the opinion of the court in Olmstead v. Beale, 19 Pick. 528, in the following language: 'The plaintiff cannot recover on his express contract, because he has not executed it on his part, and the performance is a condition precedent to the payment. He cannot recover on a quantum meruit for the labor performed, because an express contract always excludes an implied one in relation to the same matter.'

"But in the case of Britton v. Turner, 6 N. H. 481, 26 Am. Dec. 713, decided in 1834, a marked departure was taken from the former line of decisions. In that case, one quite parallel to the case at bar, it was held that 'where a contract is made of such a character a party actually receives labor or materials, and thereby derives a benefit and advantage over and above the damage which has resulted from the breach of the contract by the other party, the labor actually done, and the value received, furnish a new consideration, and the law thereupon raises a promise to pay to the extent of the reasonable worth of such excess.' And again: 'In fact we think the technical reasoning, that the performance of the whole labor is a condition precedent, and the right to recover anything dependent upon it, that the contract being entire there can be no apportionment, and there being an express contract, no other can be implied, even upon the subsequent performance of service, is not properly applicable to this species of contract, where a beneficial service has been actually performed; for we have abundant reason to believe that the general understanding of the community is that the hired laborer shall be entitled to compensation for the service actually performed, though he do not continue the entire term contracted for, and such contracts must be presumed to be made with reference to that understanding, unless an express stipulation shows the contrary. Where a beneficial service has been performed and received, therefore, under contracts of this kind, the mutual agreements cannot be considered as going to the whole of the consideration, so as to make them mutual conditions, the one precedent to the other, without a specific proviso to that effect.'"

See, also, Allen v. McKibben, 5 Mich. 449 (1858); Duncan v. Baker, 21 Kan. 99 (1878).

No recovery can be had if the contract of employment expressly stipulates a forfeiture for wrongful abandonment by the agent. Harmon v. Salmon

Eaken v. Harrison, 4 McCord, 249; McClure v. Pyatt, 4 McCord, 26. Of these the leading case is Byrd v. Boyd; the others simply follow it. In Byrd v. Boyd the court evidently legislates the exception into the law, and so, in effect, declared; for, after referring to the rule of the common law, the court proceeds to say, "There is, however, a third class of cases for which it is necessary to provide," and then declares that these cases for which it is necessary for the court "to provide" are "those where the employer reaps the full benefit of the services which have been rendered, but some circumstance occurs which renders his discharging the overseer necessary and justifiable; and that, perhaps, not immediately connected with the contract, as in the present case."

Judgment reversed.

Falls Mfg. Co., 35 Me. 447, 58 Am. Dec. 718 (1853); Richardson v. Woehler, 26 Mich. 90 (1872).

If an agent abandons his undertaking he will not be entitled to commissions, if his principal afterwards contracts with the third party. Scoville v. Trustees of Schools, 65 Ill. 523 (1872); Warren v. Rendrock Powder Co., 56 Hun, 849, 9 N. Y. Supp. 842 (1890). On the other hand, if the contract provides for payment in installments, the agent may recover the installments already earned, notwithstanding his refusal to complete the service. Taylor v. Laird, 1 H. & N. 266; Cunningham v. Morrell, 10 Johns. 203, 6 Am. Dec. 332 (1813). And by the better rule, if the agent have a sufficient excuse for failure to complete the service, as sickness, he can recover what his services are worth to the principal, deducting any damages sustained by the termination of the relation. Wolfe v. Howes, 20 N. Y. 197, 75 Am. Dec. 388 (1859); Patrick v. Putnam, 27 Vt. 759 (1855); Patterson v. Gage, 23 Vt. 558, 56 Am. Dec. 96 (1851). A mere temporary absence, particularly for cause, may not amount to an abandonment. Thrift v. Payne, 71 Ill. 408 (1874). The death of the agent before the completion of the services is regarded as an act of God which it is fair to assume, as an implied term of the contract, the parties intended should excuse nonperformance. The contract is broken and recovery may be had in quantum meruit, not in excess of the contract price, for the work performed, subject to deductions from any damage the principal suffered because the agent was unable to complete the service. Clark v. Gilbert, 26 N. Y. 279, 84 Am. Dec. 189 (1863); Wolfe v. Howes, 20 N. Y. 197, 75 Am. Dec. 388 (1859).

HAHL v. KELLOGG.[11]

(Court of Civil Appeals of Texas, Fourth District, 1906. 42 Tex. Civ. App. 636, 94 S. W. 389.)

Hahl sold 1,000 acres of land for Kellogg at $29,500. He telegraphed, "Sold your land twenty-two thousand to you." Kellogg understood this to mean $22,000, plus the agent's commission of $1,000, and accepted. When he learned the true price he sued Hahl for $7,500.

NEILL, J.[12] * * * It is hardly necessary to state the law applicable to the facts disclosed by this record. It has been known and recognized by mankind throughout all the ages. It is written in the Ten Commandments, on the Twelve Tables, in the laws of every nation, and in the heart of every man. Nor is it necessary to state that the relation of principal and agent is fiduciary, requiring the most perfect loyalty and the utmost good faith, the strictest integrity, and the fairest dealing on the part of the agent to his principal. Perry on Trusts, § 206; Bigel. on Fraud, 295; Kerr on Fraud, 152, 182; Whart. Ag. 244, 245; Mech. Ag. §§ 465, 469, 470, 643. Therefore, from the principles of law and equity applicable to the facts in this case, it follows that the court did not err, as is urged in plaintiff in error's assignments, in rendering judgment in favor of plaintiff against Hahl for $6,500. This disposes of the assignments of error of the plaintiff in error.

By defendant in error's cross-assignments it is contended that the court erred in not rendering judgment in his favor of $7,500, for the reason that Hahl, as an agent, was guilty of such fraud, gross misconduct, and bad faith to his principal as to deprive him of the right to compensation for his services. Upon the question presented by this assignment, the trial judge expressed doubt, not as to the facts, but as to the law, upon which he deemed the authorities conflicting and resolved the doubt in favor of the defendant. The rule upon this question, as we understand it, is that, where an agent is guilty of such misconduct as amounts to treachery, or has wholly failed to recognize the duties and responsibilities imposed upon him by his situation, he should receive no compensation whatever. Mechem on Agency, § 619; Story on Agency, §§ 333, 334; Brannan v. Strauss, 75 Ill. 234; Myers v. Walker, 31 Ill. 354; Sumner v. Reicheniker, 9 Kan. 320;

[11] Accord: Humphrey v. Eddy Transp. Co., 107 Mich. 163, 65 N. W. 13 (1895). For gross negligence or misconduct the agent may not merely lose his commissions, but be liable to his principal for damages sustained thereby, or for interest on money in the agent's hands and not reported to the principal. Sidway v. Am. Mtg. Co., 222 Ill. 270, 78 N. E. 561 (1906), affirming 119 Ill. App. 502 (1905); Porter v. Silvers, 35 Ind. 295 (1871); Schleifenbaum v. Rundbaken, 81 Conn. 623, 71 Atl. 899 (1909). Illegal agencies, see ante, pp. 40, 43.

[12] Part of the opinion is omitted.

Cleveland & St. L. R. Co. v. Pattison, 15 Ind. 70; Vennum v. Gregory, 21 Iowa, 328; Sea v. Carpenter, 16 Ohio, 412; Libhart v. Wood, 1 Watts & S. 265, 37 Am. Dec. 461; Segar v. Parrish, 20 Grat. 672; Neilson v. Bowman, 29 Grat. 732; Jackson v. Pleasanton, 101 Va. 282, 43 S. E. 574; Jansen v. Williams, 36 Neb. 869, 55 N. W. 279, 20 L. R. A. 207; Peterson v. Mayer, 46 Minn. 468, 49 N. W. 245, 13 L. R. A. 72; Lahr v. Kraemer, 91 Minn. 26, 97 N. W. 419. "To this extent," says Mechem on Agency, "the law is well settled." And, after an extensive examination of the authorities, the writer has been unable to find or recall an exception to the principle as stated.

Wherefore, we conclude that the defendant was not, under the facts in this case, entitled to retain $1,000 as commission for the sale; and that the judgment should have been for that sum in addition to the $6,500. Therefore, the judgment will be amended by adding that sum to the amount rendered by the trial court, thus making the judgment in favor of plaintiff against the defendant Hahl $7,500, and as so amended the judgment is affirmed.[18]

III. When the Agent is Discharged

MACFARREN v. GALLINGER.

(Supreme Court of Pennsylvania, 1904. 210 Pa. 74, 59 Atl. 435, affirming 31 Pittsb. Leg. J. [N. S.] 396.)

Bill in equity for an account. Plaintiffs were employed by defendant to sell lots.

PER CURIAM. The contract was one of agency only, and therefore revocable at any time for good cause. A very material stipulation of the contract was that plaintiffs should "deposit daily all money received" to the order of defendant, and, this not being done, defendant terminated the agreement and took charge of the business himself. The finding of the court below on this point is that, "while the terminating of the contract may have resulted in loss to plaintiffs, they alone are responsible for this loss. The agreement does not provide for a commission upon all lots sold by plaintiffs; it provides for the payment to them by defendant of 25 per cent. of moneys collected and paid over daily, which 25 per cent. is to be in full of all demands for compensation. This agreement, at least to the extent that it requires daily payments, was almost continuously violated by plaintiffs from the time the first payments were made to them under its terms until its termination."

[18] The opinion on rehearing is omitted.

An account having been stated, it appeared that plaintiffs were indebted to defendant in a greater amount than the commissions retained by the latter. The bill, therefore, was properly dismissed.

Decree affirmed, at costs of appellants.

HILDEBRAND v. AMERICAN FINE ARTS CO.

(Supreme Court of Wisconsin, 1901. 109 Wis. 171, 85 N. W. 268, 53 L. R. A. 826.)

Suit by plaintiff, as administratrix of the estate of Alfred L. Hildebrand, deceased, for damages for breach of a contract whereby defendant agreed to employ deceased as salesman for defendant for one year from January 1, 1897. June 9, 1897, deceased was discharged without his consent. Defendant alleged that the discharge was for disobedience, negligence and because of the dissolute habits of deceased.

MARSHALL, J.[14] * * * The sole defense to plaintiff's claim pleaded in the answer, that was supported by evidence on the trial, and was then and is now insisted upon, is that the contract of employment was entire and was terminated for cause.[15] It is claimed that the rule, that where an employé wrongfully terminates such a contract he cannot recover upon it for services rendered, applies to a case

[14] Part of the opinion is omitted.

[15] As to the right of the agent to compensation when he is discharged, see Glover v. Henderson, 120 Mo. 367, 25 S. W. 175, 41 Am. St. Rep. 695 (1894) ante, p. 229; Sheahan v. National S. S. Co., 87 Fed. 167, 30 C. C. A. 593, ante, p. 227.

Accord: Royal Remedy Co. v. Gregory Grocer Co., 90 Mo. App. 53 (1901); Strong v. West, 110 Ga. 382, 35 S. E. 693 (1900), in which the court says: "Where an agency is prematurely terminated by the act of the principal, the agent's right of recovery is measured by the terms of the agreement. See 1 Am. & Eng. Enc. Law (1st Ed.) p. 399, and authorities cited in note 3. It appears in this case that the work of getting possession of the property as to which Mrs. Strong was equitably entitled to be subrogated to the rights of the Lombard Company was rendered very difficult on account of the failure of the Lombard Company to pass to her the legal title, but this was finally accomplished by West, who, after recovery, was in possession with the right to make a sale. It does not appear that he was mismanaging the property in any respect, nor, with any degree of certainty, that he could not have made a sale for a sufficient amount to have paid the debt and reimbursed himself. Under the terms of his contract he was entitled to a full opportunity to bring about this result, and when he was deprived of this right by the explicit directions of Mrs. Strong that the property should be taken from his hands and turned over to a real-estate agent of her own selection she thereby deprived West of the means to which he had agreed to look for reimbursement under the terms of the original contract, and, having done so, she became liable to pay him for his services.

Cf. Milligan v. Owen, 123 Iowa, 285, 98 N. W. 792 (1904) in which the principal gave the agent no definite assurance for the continuance of the agency.

The burden of showing that the agency was revoked before the expiration of a reasonable time rests on the defendant. Hollingsworth v. Young County, 40 Tex. Civ. App. 590, 91 S. W. 1094 (1905).

where such a contract has been terminated by the employer for cause. Counsel for respondent seems to concede that such is the law. In that view it is insisted upon one side that the evidence shows conclusively that the contract was entire, and therefore that plaintiff cannot recover; and upon the other that it was not entire, and therefore that the judgment is right. Whether the trial court considered the turning point in the case to be the one in controversy between counsel and decided it in respondent's favor, and in that way reached the conclusion embodied in the judgment, does not definitely appear.

Both counsel have misconceived the principles governing the facts of this case. The rule that an action cannot be maintained by an employé upon an entire contract without first fully performing on his part, does not apply where such performance is prevented by the employer, though such prevention be for cause. In the leading case in this court on the scope of the rule contended for, Diefenback v. Stark, 56 Wis. 462, 468, 14 N. W. 621, 43 Am. Rep. 719, it was recognized that the rule does not apply where performance is prevented by act of God or the conduct of the party charged with the liability. In Mechem, Ag. § 435, it is said that the rule that no recovery can be had on an entire contract, without full performance, does not extend to those cases where the contract between the employer and employé is terminated by consent of the employer.

In England it appears that if an employé is prevented from carrying out his contract to the end, because of the conduct of his employer in discharging him for cause, he cannot recover for services rendered up to the time of the discharge. Smith, Mast. & S. (Ed. 1895) pp. 220–222; Wood, Mast. & S. § 129. But, generally speaking, such is not the law in this country. Id. § 130; 14 Am. & Eng. Enc. Law, p. 793, and cases cited; 2 Suth. Dam. (2d Ed.) p. 1546; Taylor v. Paterson, 9 La. Ann. 251; Lawrence v. Gullifer, 38 Me. 532. The rule in England and this country is thus stated by Wood on Master & Servant, at section 84: "If the contract is for a term, although the rate of compensation is at so much a day, week or month, yet if the contract is silent as to the time of payment, it is entire and indivisible, and full performance must precede a right of recovery," in the absence of circumstances showing that the contract was not understood by the parties as entire. "So inexorable has this rule been regarded in England that it has been held that where a servant hired for a term dies before full performance, no recovery could be had by his executors for the wages earned at the time of his death, and the same rule is held in the case of a servant dismissed for cause. But such is not now the rule in this country, but in all cases where the servant is prevented from performing his contract, either by sickness or death, or by reason of being discharged from the service, whether rightfully or not, he is entitled to recover for the services actually rendered."

Circumstances may exist that will enable an employer, who has discharged an employé for cause, to defeat, in whole or in part, any claim for wages up to the time of the discharge, but the mere fact that the contract is entire will not give him that power. He may recoup such damages as are allowable to him in such a case under the rules of law, because of the conduct of the employé rendering his discharge necessary. But they must be claimed in the pleading and established on the trial. Mechem, Ag. § 619; Suth. Dam., supra; Newman v. Reagan, 63 Ga. 755. The text in Sutherland is well supported by the notes and is as follows: "The general rule, when a servant is discharged for cause, is to allow him his wages to the time of discharge, subject to deductions for his torts and deficiencies." No such damages were claimed here. On the contrary, as we have seen, it was conceded on the trial that plaintiff was entitled to the judgment rendered, unless precluded therefrom by reason of the contract of employment being entire.

There is danger, as is evidenced by this case, of confusing the law applicable to a case where an employé under an entire contract voluntarily abandons it, and that applicable where such an employé is prevented from carrying out his contract by the justifiable conduct of his employer in discharging him. In the former case he cannot maintain an action upon the contract at all; in the latter he can maintain such an action for wages up to the time of the discharge, subject, however, to the right of the employer to recoup damages.

What has been said does not militate at all against the general rule laid down in Diefenback v. Stark, supra, to the effect that when a contract is entire, the consideration moving from each party to the other is entire, and their rights are reciprocal, full performance by one being requisite to his claiming any benefit under the contract from the other. However, like most general rules, it admits of exceptions, and there are several of them, one being that which is the key to plaintiff's right of recovery here, viz.: The condition precedent, of full performance by one party, is waived if the contract be terminated by the other party, regardless of whether it is by his mere consent or by his rightfully or wrongfully preventing such performance. The only bearing the cause for terminating an entire contract by one party has on the rights of the other seeking compensation for what he has done under it, may be stated as follows: If one party to a contract withdraws from it by consent of the other after part performance thereof, he can recover for what he has done at the contract rate. If a party to an entire contract, after part performance thereof by him, be prevented by the wrongful conduct of the other from rendering to such other complete performance, he can recover upon the contract for what he has done, at the contract rate, and his damages for not being allowed to fully perform, not exceeding the full amount he could have earned by such perform-

ance. If, after part performance of such a contract by one party, he is rightfully prevented by the other from further performance, he can recover on the contract for the part performance, not exceeding the contract rate, being liable to respond in damages to the adverse party to the amount of the latter's legal damages caused by the acts that justified the termination of the contract.

The foregoing is in harmony with Walsh v. Fisher, 102 Wis. 172, 78 N. W. 437, 43 L. R. A. 810, 72 Am. St. Rep. 865; Winkler v. Carriage Co., 99 Wis. 184, 74 N. W. 793; Dickinson v. Plow Co., 101 Wis. 157, 76 N. W. 1108; and other cases decided by this court. In this class of cases it is said the basis of recovery is the contract, though the amount recoverable is by no means absolutely fixed thereby. It prima facie furnishes the standard from which to compute the value of the claimant's services, and while the recovery cannot exceed the amount computable by such standard it may be reduced by damages suffered. The rule is laid down in Wood, Mast. & S., at section 130, thus: "A dismissal for cause before the expiration of the term does not operate as a rescission of the contract so as to enable the servant to sue upon quantum meruit. He must either sue upon the contract or for damages for its breach, and in either event the result of his recovery is the contract price, subject to such deductions as the master is legally entitled to." That is to say, while the person dismissed from service for cause cannot sue upon a quantum meruit, his recovery must be upon a quantum meruit on the contract basis, it being presumed that he earned and deserves the contract price for the time his services continued, till the contrary be shown by evidence establishing a right to deductions therefrom as recoverable damages. In short, as said by one of the authorities above quoted, the discharged servant is entitled in any event "to his wages to the time of his discharge, but subject to deductions for his torts and deficiencies." [16]

It follows from the principles stated that the judgment appealed from is right, regardless of any question presented in the briefs of counsel for either side. Plaintiff's intestate, after part performance of his contract with appellant, was for good cause prevented from completing his term. Such performance, at the contract rate, with interest, amounted to the sum for which judgment was rendered. No damages were claimed for the acts, of which the intestate was guilty, that necessitated his discharge. That being the situation at the time the judgment was ordered, there was nothing before the court entitling appellant to any diminution of the amount earned by the intestate at the contract rate.

The judgment of the circuit court is affirmed.

[16] Accord: Shute v. McVitie (Tex. Civ. App.) 72 S. W. 433 (1903).

McMULLAN v. DICKINSON CO.

(Supreme Court of Minnesota, 1895. 60 Minn. 156, 62 N. W. 120, 27 L. R. A. 409, 51 Am. St. Rep. 511.)

CANTY, J. On the 25th of February, 1892, the plaintiff entered into a written agreement with the defendant corporation, whereby it agreed to employ him as its assistant manager, from and after that date, as long as he should own in his own name 50 shares of the capital stock of said corporation, fully paid up, and the business of said corporation shall be continued, not exceeding the term of the existence of said corporation, and pay him for such services the sum of $1,500 per annum, payable monthly during that time, and whereby he agreed to perform said services during that time. He has ever since owned, as provided, the 50 shares of said stock, and performed said services ever since that time until the 28th of October, 1893, when he was discharged and dismissed by the defendant without cause. He alleges these facts in his complaint in this action, and also alleges that he has been ever since he was so dismissed, and is now, ready and willing to perform said services as so agreed upon, and that there is now due him the sum of $125 for each of the months of March and April, 1894, and prays judgment for the sum of $250. The defendant in its answer, for a second defense, alleges that on March 2, 1894, plaintiff commenced a similar action to this for the recovery of the sum of $512, for the period of time from his said discharge to the 1st of March, 1894, alleging the same facts and the same breach, and that on April 16, 1894, he recovered judgment in that action against this defendant for that sum and costs, and this is pleaded in bar of the present action. The plaintiff demurred to this defense, and from an order sustaining the demurrer the defendant appeals.

The plaintiff brought each action for installments of wages claimed to be due, on the theory of constructive service. The doctrine of constructive service was first laid down by Lord Ellenborough in Gandell v. Pontigny, 4 Camp. 375, and this case was followed in England and this country for a long time (Wood, Mast. & Serv. 254), and is still upheld by several courts (Isaacs v. Davies, 68 Ga. 169; Armfield v. Nash, 31 Miss. 361; Strauss v. Meertief, 64 Ala. 299, 38 Am. Rep. 8). It has been repudiated by the courts of England (Goodman v. Pocock, 15 Adol. & E. [N. S.] 574; Wood, Mast. & Serv. 254), and by many of the courts in this country (Id.; and notes to Decamp v. Hewitt, 11 Rob. [La.] 290, 43 Am. Dec. 204), as unsound and inconsistent with itself, as it assumes that the discharged servant has since his discharge remained ready, willing, and able to perform the services for which he was hired, while sound principles require him to seek employment elsewhere, and thereby mitigate the damages caused by his discharge. His remedy is for damages for breach of the contract, and not for

wages for its performance. But the courts, which deny his right to recover wages as for constructive service, have denied him any remedy except one for damages, which, if seemingly more logical in theory, is most absurd in its practical results. These courts give him no remedy except the one which is given for the recovery of loss of profits for the breach of other contracts, and hold that the contract is entire, even though the wages are payable in installments, and that he exhausts his remedy by an action for a part of such damages, no matter how long the contract would have run if it had not been broken. See James v. Allen Co., 44 Ohio St. 226, 6 N. E. 246, 58 Am. Rep. 821; Moody v. Leverich, 4 Daly, 401; Colburn v. Woodworth, 31 Barb. 381; Booge v. Railroad Co., 33 Mo. 212, 82 Am. Dec. 160.

No one action to recover all the damages for such a breach of such a contract can furnish any adequate remedy, or do anything like substantial justice between the parties. By its charter the life of this corporation is thirty years. If the action is commenced immediately after the breach, how can prospective damages be assessed for this thirty years, or for even one year? To presume that the discharged servant will not be able for a large part of that time to obtain other employment, and award him large damages, might be grossly unjust to the defendant. Again, the servant is entitled to actual indemnity, not to such speculative indemnity as must necessarily be given by awarding him prospective damages. His contract was not a speculative one, and the law should not make it such. That men can and do find employment is the general rule, and enforced idleness the exception. It should not be presumed in advance that the exceptional will occur. This is not in conflict with the rule that, in an action for retrospective damages for such a breach, the burden is on the defendant to show that the discharged servant could have found employment. In that case, as in others, reasonable diligence will be presumed. When it appears that he has not found employment or been employed, there is no presumption that it was his fault, and, under such circumstances, it will be presumed that the exceptional has happened. But to presume that the exceptional will happen is very different. In an action for such a breach of a contract for services, prospective damages beyond the day of trial are too contingent and uncertain, and cannot be assessed. 2 Suth. Dam. 471; Gordon v. Brewster, 7 Wis. 355; Fowler & Proutt v. Armour, 24 Ala. 194; Wright v. Falkner, 37 Ala. 274; Colburn v. Woodworth, 31 Barb. 385.

Then, if the discharged servant can have but one action, it is necessary for him to starve and wait as long as possible before commencing it. If he waits longer than six years after the breach, the statute of limitations will have run, and he will lose his whole claim. If he brings his action within the six years, he will lose his claim for the balance of the time after the day of trial. Under this rule, the measure

of damages for the breach of a 30 year contract is no greater than for the breach of a 6 or 7 year contract. Such a remedy is a travesty on justice. Although the servant has stipulated for a weekly, monthly, or quarterly income, it assumes that he can live for years without any income, after which time he will cease to live or need income. The fallacy lies in assuming that, on the breach of the contract, loss of wages is analogous to loss of profits, and that the same rule of damages applies, while in fact the cases are wholly dissimilar, and there is scarcely a parallel between them. In the one case the liability is absolute; in the other it is contingent. If the rule of damages were the same, then, in the case of the breach of the contract for service, the discharged servant should be allowed only the amount which the stipulated wages exceed the market value of the service to be performed, without regard to whether he could obtain other employment or not. If the stipulated wages did not exceed the market value of the service, he would be entitled to only nominal damages; and in no case could his failure to find other employment vary the measure of damages. Clearly, this is not the rule. In the one case the liability is a contingent liability for loss of wages; in the other case it is an absolute liability for loss of profits. Such contingent liability cannot be ascertained in advance of the happening of the contingency, and that is why prospective damages for loss of wages are too contingent and are too speculative and uncertain to be allowed, while retrospective damages for such loss are of the most certain character. On the other hand, if damages for loss of profits are too speculative and uncertain to be allowed, they are equally so, whether prospective or retrospective. "The pecuniary advantages which would have been realized but for the defendant's act must be ascertained without the aid which their actual existence would afford. The plaintiff's right to recover for such a loss depends on his proving with sufficient certainty that such advantages would have resulted, and, therefore, that the act complained of prevented them." 1 Suth. Dam. (1st Ed.) 107.

It is our opinion that the servant wrongfully discharged is entitled to indemnity for loss of wages, and for the full measure of this indemnity the master is clearly liable. This liability accrues by installments on successive contingencies. Each contingency consists in the failure of the servant without his fault to earn, during the installment period named in the contract, the amount of wages which he would have earned if the contract had been performed, and the master is liable for the deficiency. This rule of damages is not consistent with the doctrine of constructive service, but it is the rule which has usually been applied by the courts which adopted that doctrine. Under that doctrine the master should be held liable to the discharged servant for wages as if earned, while in fact he is held only for indemnity for loss of wages. The fiction of constructive service is false and illogical, but the measure of damages given under that fiction is correct and logi-

cal.[17] It is simply a case of a wrong reason given for a correct rule. Instead of rejecting the false reason and retaining the correct rule, many courts have rejected both the rule and the reason. In our opinion, this rule of damages should be retained; but the true ground on which it is based is not that of constructive service, but the liability of the master to indemnify the discharged servant, not to pay him wages, and this indemnity accrues by installments. The original breach is not total, but the failure to pay the successive installments constitutes successive breaches. Since the days of Lord Ellenborough this class of cases has been in some courts an exception to the rule that there can be but one action for damages for the breach of a contract, and there are strong reasons why it should be an exception. Because the discharged servant may, if he so elects, bring successive actions for the installments of indemnity as they accrue, it does not follow that he cannot elect to consider the breach total, and bring one action for all his damages, and recover all of the same accruing up to the time of trial. Fowler & Proutt v. Armour, 24 Ala. 194; Strauss v. Meertief, 64 Ala. 299, 38 Am. Rep. 8. But the wrongdoer can have no such election. He should not be allowed to take advantage of his own wrong, and, for the purpose of preventing the use of any adequate remedy and defeating any adequate recovery, to insist that his own breach is total.

The order appealed from should be affirmed. So ordered.

MERRIMAN v. McCORMICK HARVESTING MACH. CO.

(Supreme Court of Wisconsin, 1897. 96 Wis. 600, 71 N. W. 1050.)

Action to recover an agent's commissions, and damages for failure to perform contracts. Plaintiffs were employed to sell harvesting machines and supplies, to house the machines ordered, and to deliver, set up and fairly start every machine sold. After taking twenty-nine orders, plaintiffs were discharged, and the contract was annulled.

WINSLOW, J.[18] [After stating the facts:] There was no very serious dispute as to the facts of the case, nor is there any very material difference between the findings of fact made by the referee and those made by the circuit judge, except with regard to the failure to fill the order for binding twine, which will be considered later; but

[17] The injustice of the rule generally followed, and the inconsistency of the doctrine of constructive service as set forth in the principal case, are generally recognized. Nevertheless the weight of authority is against any recognition of constructive service, even as a measure of damages. See the full discussions in Olmstead v. Bach, 78 Md. 132, 27 Atl. 501, 22 L. R. A. 74, 44 Am. St. Rep. 273 (1893); Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285 (1875), and especially in James v. Allen County, 44 Ohio St. 226, 6 N. E. 246, 58 Am. Rep. 821 (1887). See, also, extended note in 51 Am. St. Rep. 515.

[18] Part of the opinion is omitted.

there was a radical difference between the legal conclusions resulting from the facts. The referee was of opinion that the plaintiffs were entitled to recover their full commissions upon all machines for which they had taken orders, except when they afterwards furnished a different machine; while the circuit judge concluded that they were entitled to no compensation for their services in obtaining the orders, save for the one machine delivered before the cancellation of the contract.

We find ourselves unable to agree with either conclusion. We think, under the provisions of the contract, the plaintiffs were entitled to recover the reasonable value of their services in obtaining the orders for machines which were afterwards actually filled with McCormick machines, and no more. The reason for this conclusion we will briefly state. The contract provides for a certain commission upon the sale of each machine, which is to be earned, not by obtaining the order alone, but by receiving and housing the machine, setting it up, and running it, instructing the purchaser, receiving and transmitting the money or notes therefor, and by rendering other services connected with the sale. Manifestly the contract is entire as to each commission, and is not earned except by the performance of all the requirements. Furthermore, there is a special provision that commissions shall only be paid on machines sold and settled for, and none shall be paid on orders not filled. Had the plaintiffs brought action for their commissions after taking the orders, and prior to the cancellation of the contract, it is very certain that they could not recover them, because they had not been earned, nor could they have recovered upon quantum meruit, because the contract is an entire contract as to each commission. Now the theory upon which the referee allowed the entire commission was that by the cancellation of the contract the defendant had rendered it impossible for the plaintiffs to carry it out, and hence that they ought to recover the full commission, because they were ready to carry it out, but were prevented by the defendant from doing so.

The well-settled rule is that when a contractor's performance is stopped by the fault of the employer, he may recover upon quantum meruit for what he has done, and also may recover damages for being prevented from completing the work. 2 Suth. Dam. (2d Ed.) § 713. But this second element of damages, i. e., the damages resulting from being prevented from completing the work, are plainly given because of the wrongful stoppage of the work. Where the stoppage is absolutely rightful, and in strict accord with contract provisions, there can be no damages, because damages do not arise from the proper exercise of a legal right. Now in the present case the parties had agreed that the defendant might at any time end the contract, and take into its possession all orders, notes, accounts, moneys, machines, or other property of the defendant in the hands of

the plaintiffs. The provision is certainly very drastic, but it is admittedly a part of the contract, and no claim of fraud or mistake is made with reference to it. Under these circumstances, the court's duty is simply to construe it. It was put in the contract with a definite purpose, and that purpose plainly was to give the defendant power to end the agency at any time, and place the entire business in other hands. This power must be reasonably construed. It should not be construed as depriving the plaintiffs of reasonable remuneration for their services already rendered in obtaining orders which are afterwards filled with McCormick machines,[19] but it certainly must be construed as authorizing the defendant lawfully to end the agency at any time, and thus rightfully to prevent the earning of the full commissions. It was certainly the duty of the plaintiffs to surrender up the orders they had taken to the defendant when the contract was canceled. Not only does the contract provide that they shall do so, but it further provides that they shall not retain any of defendant's property in their hands as security for commissions. We do not think, however, that, where it can be shown that any such order was afterwards actually filled with a McCormick machine, this failure of duty should prevent the plaintiffs from recovering the reasonable value of their services in obtaining the order. As it cannot be ascertained from the evidence just how many of the orders taken were afterwards filled with McCormick machines, nor what the reasonable value of the preliminary canvassing and procuring of such orders was, further testimony must needs be taken upon these questions. * * *

Reversed and remanded.

IV. Commissions to the Agent

GILLETT v. CORUM.

(Supreme Court of Kansas, 1871. 7 Kan. 156.)

Brewer, J.[20] This case comes here on error from the district court of Leavenworth county, this being its second visit to this tribunal. 5 Kan. 608. On the first trial in the court below, judgment was rendered in favor of the plaintiff, (defendant in error here,) which was by this court reversed for error in the instructions. On a second trial, the plaintiff again obtained judgment, which judgment is now sought to be reversed, also on account of alleged errors in the

[19] The discharge of an agent cannot affect his commissions already earned, though not due until the delivery of the goods sold. Dibble v. Dimick, 143 N. Y. 549, 38 N. E. 724 (1894), affirming 4 Misc. Rep. 190, 23 N. Y. Supp. 680 (1893); Singer Mfg. Co. v. Brewer, 78 Ark. 202, 93 S. W. 755 (1906), unless so stipulated in the contract of agency, Wheeler & Wilson Mfg. Co. v. Gallivan, 10 Neb. 313, 4 N. W. 1061 (1880).

[20] Part of the opinion is omitted.

instructions. The action was brought to recover for services alleged to have been performed by Corum as the agent of Gillett, in the sale of a tract of land. These facts appear from the testimony without controversy: (1) That plaintiff at one time was authorized by defendant to act as his agent in selling the land, and promised compensation if he accomplished a sale; (2) that he had some negotiations with a man named Dunlap, concerning the sale of said land during the continuance of such authority; (3) that said Dunlap afterwards purchased from defendant, personally, said land, at a price not less than that for which plaintiff was authorized to sell; and (4) that intermediate the first suggestion by plaintiff to Dunlap of a sale of this land, and the final consummation of the sale by defendant, Dunlap was absent in the southern part of the state, for a few days, looking at land there. There is a dispute in the testimony as to whether plaintiff's authority as agent was revoked prior to the sale; whether negotiations between plaintiff and Dunlap were broken off, and negotiations afterwards commenced anew between Dunlap and defendant directly; and also as to what part, if any, plaintiff had in furthering the sale after Dunlap's return.

1. With this statement of the case let us examine the alleged errors. Our attention is called to three: First, the court refused to give the eighth instruction asked by defendant, which reads as follows: "If Corum was authorized by Gillett to sell the land or find a purchaser at a certain price, and Dunlap had not, at or before the time he went south, proposed to take the land at that price, or at a price which was afterwards accepted, and such a proposal was not pending when he went south, and if before his return, or before negotiations were renewed, Corum's authority had been revoked or had expired, and Dunlap afterwards went directly to Gillett and made a bargain and purchased the land from him, Corum is not entitled to recover."

The court had just given, at the instance of the defendant, these two instructions:

"(6) If there was no proposition pending between Corum and Dunlap when Dunlap went south, and if before Dunlap returned Gillett revoked the authority of Corum to sell, or such authority had expired, and if afterwards Dunlap negotiated with Gillett himself and purchased the land from him, Corum is not entitled to recover.

"(7) Unless Corum, while his authority continued unrevoked or unexpired, had effected a bargain or sale, or had found a purchaser in a condition and ready and willing to take the land on the terms upon which Gillett had authorized Corum to sell, he, Corum, cannot recover."

These two instructions gave the law to the jury in as favorable light for the defendant as he could ask; and in so far as the eighth instruction restates what is said in the sixth and seventh, it is open to this objection, that the court is not bound to repeat what it has

once said. It restates the law given in the sixth and seventh, but it narrows the essential statement so far as to render it justly objectionable. It reads: "If Dunlap had not proposed." Would not a proposition from Corum and an acceptance by Dunlap have been sufficient? This instruction in effect tells the jury that unless Dunlap *proposed* to buy before Corum's authority was revoked, the latter could recover nothing. It excludes everything but a proposition from Dunlap. We think the court had fully stated the law, and properly refused the eighth instruction.

2. The court instructed the jury as follows: "If the plaintiff was agent of the defendant, as he claims, and in pursuance of the authority given him found a purchaser of the premises, and put the purchaser and defendant in communication with reference to the land, and negotiations were thereby set on foot between them which led to a bargain and sale of the premises, the defendant could not, by taking the negotiations out of the hands of the plaintiff, and completing the sale in person, defeat the plaintiff's right to compensation." We fail to see any error in this. If the law were not as stated, the occupation of a real estate agent would be precarious indeed. An agent is employed to sell real estate. He looks around and finds a purchaser, one who is able and ready and willing to buy. He brings the parties together and starts negotiations which result in a sale. Can the principal after this discharge the agent, consummate the sale himself, and refuse the agent compensation? We think not. That which the agent is employed for, is to find a purchaser. He finds one. The principal gets the benefit of his labor and must pay for it. Hedden v. Shepherd, 29 N. J. Law, 334; Ludlow v. Carman, 2 Hilt. 107. The case cited by counsel for plaintiff in error (McGavock v. Woodlief, 20 How. 221, 15 L. Ed. 884) is not in point. There the agent had brought a supposed purchaser to his principal; the terms named had been accepted; a contract reciting those terms signed. But, when they came to the execution of the deeds and the payment of the consideration, the supposed purchaser was unable to pay, and the attempted sale fell through. The agent found a party who was willing to buy, but not able nor ready. He therefore found no purchaser, and was entitled to no commission.[21] * * *

Judgment for plaintiff affirmed.

[21] Accord: Warren Chemical & Mfg. Co. v. Holbrook, 118 N. Y. 586, 23 N. E. 908, 16 Am. St. Rep. 788 (1890); Grogan v. Smith, 7 T. L. R. 132, 2 Eng. Rul. Cas. 533 (1890). The third party must be willing to contract on the specified terms or the agent has not earned his commissions. Alta Investment Co. v. Worden, 25 Colo. 215, 53 Pac. 1047 (1898).

ATTRILL v. PATTERSON.

(Court of Appeals of Maryland, 1881. 58 Md. 226.)

Attrill owned a controlling interest in the Crescent City Gas Light Company of New Orleans, and desired to make some arrangement to buy the works of the old Company, the New Orleans Gas Light Company. He offered Patterson $50,000 if he would go to New Orleans and effect some compromise of the conflicting claims of the two companies. The efforts failed and Patterson advised suit. Attrill finally brought suit and was completely successful, in consequence of which he was able to amalgamate the new with the old company on favorable terms. Patterson demanded his $50,000, but was refused and brought suit. Judgment for plaintiff and defendant appealed.

IRVING, J.[22] * * * It may be laid down, as a general rule, that an agent's authority to act for a principal, is always revocable at the will of the principal; and may at any time be put an end to by withdrawing the authority; unless the authority be coupled with an interest; or has been conferred on the agent for a valuable compensation moving from him to the principal. 1 Parsons on Contracts, 69; Wharton on Agency, 95, and notes; Story on Agency, §§ 463 and 464; Hunt v. Rousmanier, 8 Wheat. 174, 5 L. Ed. 589; Simpson v. Lamb, 84 E. C. L., 603; Blackstone v. Buttermore, 53 Pa. 266; Hartley's Appeal, 53 Pa. 212, 91 Am. Dec. 207; Creager v. Link, 7 Md. 259.

What constitutes an authority coupled with an interest, the decisions without exception, are agreed about. In Hunt v. Rousmanier already cited, Chief Justice Marshall says, it "is an interest in the thing itself on which the power is to be exercised, and not an interest in that which is to be produced by the exercise of the power." In Blackstone v. Buttermore, 53 Pa. 266, the same rule is laid down in almost the same terms, and that is now the doctrine of all the text books.

There is a class of cases, where, if the agent has done something in virtue of his authority, and incurred expense before the agency is revoked, he will be entitled to be reimbursed. For example, if the negotiations of a broker employed to sell property be broken off by the principal, after he has gone to trouble and expense in the matter, he will be entitled to recover for what he has done, on a quantum meruit. Story on Agency, § 329; Wharton on Agency, § 322. This case having been assimilated to the case of a broker to sell real or personal estate, or negotiate a loan, it is necessary to lay down the general rule applying to such agents. The rule is, that the broker is not entitled to his commissions till the work is *complete;* but, if after the sale is virtually effected, the principal takes the matter into his own hands, and revokes the agency, he cannot escape the payment of commissions. In such cases, and there are many of them in the

[22] Part of the opinion is omitted.

books, the broker is regarded as having earned his commission or compensation, by being the procuring cause of the transaction being consummated. Ewell's Evans on Agency, § 453; Keys v. Johnson, 68 Pa. 42. In Keener v. Harrod & Brooke, 2 Md. 71, 56 Am. Dec. 706, Judge Tuck, speaking for this court, expounds the principle controlling such cases thus: "We understand the rule to be this, (in the absence of evidence of usage,) that the *mere fact* of the agent having introduced the purchaser to the seller, or disclosed the names by which they came together to treat, will not entitle to compensation; but, if it appears, that such introduction or disclosure was the *foundation* on which the negotiation was begun, conducted, and the sale made, the parties cannot afterward, by agreement between themselves, withdraw the matter from the agent's hands, so as to deprive the agent of his commissions." This case, and all others are in harmony with it, establishes the rule that the agent must be the *procuring cause* of the transaction, whatever it is, being consummated. It is a matter of proof. The fact that the agent brought the parties together, might raise a presumption, if the transaction was consummated in a short time thereafter, that he was the procuring cause; but that could be rebutted, as was done in Earp v. Cummins, 54 Pa. 396, 93 Am. Dec. 718, where the purchaser (who the court said, if anybody knew, must know) testified he "was not influenced at all in making the purchase, by the agent." There, the negotiations, which were first begun, because of some publications by the agent, who sued for commissions, were broken off. Several months afterwards, by the *influence of other parties,* the purchaser was induced to renew the treaty, and bought the property. The court of final resort, said the plaintiff, was improperly allowed to recover commissions, and judgment was reversed.

Applying these principles to the case in hand, we cannot see how Patterson can be regarded as having contributed, in any proper legal sense, to the production of the result finally attained. It can hardly be termed a compromise. It was the dictation of terms to a conquered or captured foe. But Patterson insists that, because he advised the suit, he is entitled to his compensation; for the "compromise," effected at the termination of the suit, "was a good one." The institution of the suit did not bring the compromise. Had the bare institution of suit brought the compromise, Patterson's claim would be better founded. It was, however, nothing less than the *judgment* of the court of last resort, after tedious and costly litigation that rendered the old company helpless, that brought consolidation. An essential condition, then, in the original contract, was not fulfilled by the agent. He did not procure the compromise.

All the parties best able to speak on the subject, as in Earp v. Cummins, say he did nothing towards bringing it about; and they were not influenced, in the slightest degree, by anything he had done. The original contract, as we have said, did not give Patterson unlimited

powers, to settle the matter by any means whatever, including costly litigation, so that he should be entitled to his contingent fee, no matter how the result was brought about.[23] * * * Reversed.

LA FORCE v. WASHINGTON UNIVERSITY.

(Kansas City Court of Appeals, Missouri, 1904. 106 Mo. App. 517, 81 S. W. 209.)

ELLISON, J.[24] This action was instituted by plaintiff to recover a commission for the sale of real estate in Kansas City, Mo., belonging to defendant. The trial court found against the plaintiff, and, judgment being entered for defendant, the former appealed.

It appears that the plaintiff resided in Kansas City, and that the defendant was at St. Louis, and that they entered into a written contract concerning the sale of the property. This contract was executed on the 21st of October, 1901, and was to be in force for the limited time of 90 days, which period expired January 21, 1902. But some 10 or 12 days before the limit expired it was extended, by mutual agreement, for a period of 30 days further; such extension expiring on February 21, 1902. Before the contract was executed, plaintiff thought he could sell the property if he had the exclusive control of it. He had especially in view as purchasers a firm of wholesale merchants in Kansas City. We here set out the contract: "Kansas City, Mo., Oct. 21, 1901. This memorandum of agreement, by and between Washington University, a corporation under the laws of Missouri, party of the first part, of St. Louis, Missouri, and Felix L. La Force, of Jackson county, Missouri, party of the second part, witnesseth: Said party of the first part, for and in consideration of the sum of one dollar paid by second party, the receipt of which is hereby acknowledged, does hereby give the said second party the exclusive option and privilege to buy their southeast corner of Eighth and May streets, Kansas City, Missouri [describing it]. The price agreed upon by said first party to sell to said second party, is the sum of fifty-six thousand and five hundred dollars, net, for the 150x142 feet, no commission to be paid by said first party. Terms: Cash, or one-third cash; deferred payments to bear interest at five per cent. from January 21st, 1902. This contract or option to purchase is to run for ninety days from this date. In the event of purchase by the said

[23] Accord: Sibbald v. Bethlehem Iron Co., 83 N. Y. 378, 38 Am. Rep. 441 (1881); Kelly v. Marshall, 172 Pa. 396, 33 Atl. 690 (1896); and Lumley v. Nicholson, 34 Wkly. Rep. 716 (1886), in which the principal actually did afterward contract with parties introduced to him by the agent.

The fact that an agent has procured a customer for his principal does not mortgage the business of such customer forever. Gilbert v. Quinlan, 59 Hun, 508, 13 N. Y. Supp. 671 (1891); Curtis v. Nixon, 24 L. T. Rep. (N. S.) 706 (1871).

[24] Part of the opinion is omitted.

second party or his assigns, the said first party is to convey said real estate free and clear of all incumbrance, except West Terrace Park assessment; and they also agree to furnish a complete abstract from government down to date, also certificates as to judgment and taxes. In the event second party elects to buy said real estate within the time herein agreed, or sells the same, the said first party is to give the second party or his assigns thirty days' extra time to examine title and close the deal. Said thirty days' extra time is to date from the date of expiration of this contract. In the event said second party fails to take advantage of the terms of this contract as herein specified, this instrument becomes void." On the reverse side is the following: "St. Louis, Mo., Jan. 10, 1902. By mutual consent the above contract is extended until February 21, 1902."

During the first 90-day period plaintiff made diligent effort to sell, but towards the latter part he saw he would not be able to consummate a sale within the time limited, and he sought an extension for another period of 90 days. The defendant refused that length of time, but did extend the contract for a period of 30 days, as already stated, and as is shown in the copy just set out. Plaintiff faithfully pursued his endeavor to sell through the extended time, but without success. He endeavored to obtain another extension within which he hoped to make a sale, but defendant refused. Several months after the expiration of the extended time, defendant sold the property to the wholesale firm with whom plaintiff had been negotiating from the beginning. Plaintiff claimed the usual and customary commission on sales of that magnitude, which defendant refused to pay, contending that it was under no obligation to pay any amount. * * *

So, conceding that the contract made plaintiff an agent to sell, it is manifest that such agency was a definite and limited agency in the following particulars, viz.: that it was for a specific period (including extension) of 120 days from October 21, 1901, that the price should be $56,500; and that there was to be no commission charged. It is conceded that the sale was not made within the time limited. Now, the law is that, even where there is no specific time named as limiting the agency, and a reasonable time elapses without a sale (circumstances considered), the owner may in good faith, without design to avoid payment of commission, revoke the agency and sell to the party with whom the agent had been negotiating. Sibbald v. Iron Co., 83 N. Y. 378, 38 Am. Rep. 441; Wylie v. Bank, 61 N. Y. 415; Stedman v. Richardson, 100 Ky. 79, 37 S. W. 259; Fairchild v. Cunningham, 84 Minn. 521, 88 N. W. 15. By much greater reason, therefore, should it be said that, where parties stipulate that an agency to sell another's property is limited to a definite period, it will terminate at that period; and, if a sale has not been made within the time, no compensation (in the absence of fraud) can be recovered on account of a subsequent sale by the owner. The law has been repeatedly so declared. Page v. Griffin, 71 Mo. App. 524; Beauchamp v. Higgins, 20 Mo. App.

514; Stedman v. Richardson, 100 Ky. 79, 83, 37 S. W. 259; Antisdel v. Canfield, 119 Mich. 229, 236, 77 N. W. 944. Mechem, in his work on Agency, § 965, says that: "It will be seen from this rule that when the time is limited the performance must be within that time, and the broker will not be entitled to commissions because efforts begun within that time bear fruit after its expiration." [25]

It seems that the plaintiff must have recognized that such was the law, for he incorporated in the contract a stipulation which protected him, in case the time should expire after he had made the sale, but before it was consummated, viz.: that, in the event he should sell the property "within the time herein agreed," the defendant would give "thirty days' extra time to examine the title and close the deal." And that is not all. If the contract is to be construed as creating an agency, it was not only for a specific time, but it was authority to dispose of it for a designated net sum, without commission. The contract and the subsequent correspondence of the parties disclose, without doubt or question, that the parties understood that defendant would be satisfied to receive the amount named, and that plaintiff was to have all over that amount he could obtain for the property. Upon that basis plaintiff sought, and very properly sought, to obtain a price several thousand dollars in advance of the price named in the contract. If he had been successful, his compensation would have been manyfold greater than the sum he now claims. The compensation for plaintiff's labor was contingent. If he succeeded, it might be very large; and if he failed it would be nothing. * * *

Affirmed.

ATTERBURY v. HOPKINS.

(Kansas City Courts of Appeals, Missouri, 1906. 122 Mo. App. 172, 99 S. W. 11.)

ELLISON, J.[26] Defendants engaged the plaintiffs, for a stated commission, to sell or exchange for them their stock of hardware and a house and lot, all in the town of Brunswick. Plaintiffs charge that they procured a purchaser for the property, and that defendants refused to pay them their commission, whereupon they instituted this action. They prevailed in the trial court.

Much of the matter urged by appellants against the judgment is outside the issues made by their answer, and the theory upon which they tried the case in the circuit court. The answer admits the employment of plaintiffs, and that they procured a purchaser, and sets up but one defense, and that is that plaintiffs accepted employment at their

[25] It is enough however if the agent procure customers able and willing to perform, even though the principal cannot, or does not, contract with such customer. Kelly v. Phelps, 57 Wis. 425, 15 N. W. 385 (1883).

[26] Part of the opinion is omitted.

hands when, without their knowledge or consent, plaintiffs were also in the employment of such purchaser. The law is that one cannot secretly act for one party while in the employ of the opposing party, and that, if he does, he forfeits all right to compensation at the hands of the party thus deceived and betrayed. The reason for this just rule ceases, however, if there is no deception, and each of the opposing parties are aware of the dual agency. "If, having full knowledge of his relations to each, they see fit mutually to confide in him, there can be no legal objection to such an employment, nor will either of the principals be permitted afterwards to escape responsibility because of such double employment." Mechem on Agency, § 67; Stripling v. McGuire, 108 Mo. App. 594, 84 S. W. 164.[27] The issue in respect to the law thus stated was fully and fairly submitted to the jury, and the verdict, being supported by the evidence we accept as conclusive. * * * Judgment affirmed.

SECTION 2.—REIMBURSEMENT AND INDEMNITY

ADAMSON v. JARVIS.

(Court of Common Pleas, 1827. 4 Bing. 66, 13 E. C. L. 403.)

BEST, C. J.[28] A motion has been made in arrest of judgment *after verdict*. The plaintiff relies on the second count, on which only his verdict and judgment are to be entered.

Stripped of the technical language with which it is encumbered, the case stated on the second count is this: that the defendant having property of great value in his *possession*, represented to the plaintiff that he had authority to dispose of such property; and followed this representation by a request, that the plaintiff would sell the property for him, the defendant. The plaintiff, believing the representation of the defendant as to his right to the property, and not knowing, either at the time the representation was made, or at any time after, that it was not his, as the agent of the defendant, sold the property; and after paying such sums out of the proceeds as he was bound to pay, and making such deductions as he had a right

[27] The distinctions between illegal and legal double agencies are discussed at length in Bell v. McConnell, 37 Ohio St. 396, 41 Am. Rep. 528 (1881), which finds no objection to recovery of commissions from both principals, where both are fully advised, and consent to the double employment, though such transactions are regarded with suspicion. In such case each principal gets what he contracted for, and should pay for it. The rule forbidding double agency is for the benefit of the principals, and if they consent to it that is an end to the objection. Fryer v. Harker, 142 Iowa, 708, 121 N. W. 526, 23 L. R. A. (N. S.) 477 (1909). See, also, ante, p. 513 ff.

[28] Part of the opinion is omitted.

to make, and which the defendant appears to have allowed, paid the residue to the defendant.

The defendant, who had induced the plaintiff to make this sale by his false representation and request to sell, and who, after the sale, continued to assert his right to sell, and confirmed the agency of the plaintiff by accepting from him the residue of the proceeds of the sale, had no right to dispose of this property. The consequence has been, that the plaintiff, supposing, from the defendant's false representations, he had an authority which he had not, and acting as the defendant's agent, has rendered himself liable to an action at the suit of the true owner of the goods, and has been obliged to pay damages and costs, whilst the defendant, the sole cause of the sale, quietly keeps the fruits of it in his pocket.

It has been stated at the bar that this case is to be governed by the principles that regulate all laws of principal and agent:—agreed: every man who employs another to do an act which the employer appears to have a right to authorize him to do, undertakes to indemnify him for all such acts as would *be lawful* if the employer had the authority he pretends to have. A contrary doctrine would create great alarm.

Auctioneers, brokers, factors, and agents, do not take regular indemnities. These would be indeed surprised, if, having sold goods for a man and paid him the proceeds, and having suffered afterwards in an action at the suit of the true owners, they were to find themselves wrong-doers, and could not recover compensation from him who had induced them to do the wrong.

It was certainly decided in Merryweather v. Nixon, 8 T. R. 186, that one wrong-doer could not sue another for contribution; Lord Kenyon, however, said, "that the decision would not affect cases of indemnity, where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right." This is the only decided case on the subject that is intelligible.

There is a case of Walton v. Hanbury et al., 2 Vern. 592, but it is so imperfectly stated, that it is impossible to get at the principle of the judgment.

The case of Philips v. Biggs, Hardr. 164, was never decided; but the Court of Chancery seemed to consider the case of two sheriffs of Middlesex, where one had paid the damages *in an action for an escape, and sued the other for contribution, as like the case of two joint obligors.*

From the inclination of the Court on this last case, and from the concluding part of Lord Kenyon's judgment in Merryweather v. Nixon, and from reason, justice, and sound policy, the rule that wrong-doers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act.

If a man buys the goods of another from a person who has no authority to sell them, he is a wrong-doer to the person whose goods he takes; yet he may recover compensation against the person who sold the goods to him, although the person who sold them did not undertake that he had a right to sell, and did not know that he had no right to sell. That is proved by Medina v. Stoughton, 1 Salk. 210; Sanders v. Powel, 1 Lev. 129; Crosse v. Gardner, Carth. 90; 1 Roll. Abr. 91, l. 5, and many other cases.

These cases rest on this principle, that if a man, having the possession of property which gives him the character of owner, affirms that he is owner, and thereby induces a man to buy, when in point of fact the affirmant is not the owner, he is liable to an action.

It has been said, that is because there is a breach of *contract* to rest the action on, and that there is no contract in this case. This is not the true principle: it is this: he who affirms either *what he does not know to be true,* or knows to be false, to another's prejudice and his own gain, is both in morality and law guilty of falsehood, and must answer in damages.

But here is a contract: the plaintiff is hired by defendant to sell, which implies a warranty to indemnify against all the consequences that follow the sale.[29] * * *

Rule discharged.

[29] In Hoggan v. Cahoon, 26 Utah, 444, 73 Pac. 512, 99 Am. St. Rep. 837 (1903), the court puts the matter thus: "If the allegations are in fact true, the plaintiff has a right of recovery. The facts stated are such as to characterize the case as an exception to the rule of law that tort feasors or wrong-doers cannot have redress against each other. That rule applies to cases where he who seeks redress knew or must be presumed to have known that the transaction which resulted in the damages he was compelled to pay was tortious and unlawful. But where, as appears from the allegations in this case, an agent acts in good faith for his principal, under the principal's direction, and relies upon his representations that the transaction is lawful, and the same is not manifestly unlawful, the law implies indemnity, for damages of third parties, to the agent from the principal; and if, as the result of acts so performed, the agent is mulcted in damages, the principal must respond to the agent for the same, as well as for the necessary expenses incurred in resisting the claims of third parties who were injured by the transaction. 'The agent has the right to assume that the principal will not call upon him to perform any duty which would render him liable in damages to third persons. Having no personal interest in the act, other than the performance of his duty, the agent should not be required to suffer loss from the doing of an act apparently lawful in itself, and which he has undertaken to do by the direction and for the benefit and advantage of his principal. If in the performance of such an act, therefore, the agent invades the rights of third persons, and incurs liability to them, the loss should fall rather upon him for whose benefit and by whose direction it was done, than upon him whose only intention was to do his duty to his principal. Wherever, then, the agent is called upon by his principal to do an act which is not manifestly illegal, and which he does not know to be wrong, the law implies a promise on the part of the principal to indemnify the agent for such losses and damages as flow directly and immediately from the execution of the agency. Thus an agent is entitled to be indemnified when he is compelled to pay damages for taking personal property by direction of his principal, which, though

BACON v. FOURTH NAT. BANK.[80]

(City Court of New York, Trial Term, 1889. 9 N. Y. Supp. 435)

McADAM, C. J. The fees paid to the attorneys in Boston were expended under circumstances from which the law implies a request to pay for them on the part of the plaintiff. Legal advice and services may be as necessary to protect the property as the aid of a physician or surgeon is to protect life. Neither may prove serviceable in some cases, in others extremely so, depending in a measure on results. Prudence requires their employment in all cases wherein property or life is imperiled. It would be negligence not to employ professional aid in cases requiring it. The result does not determine the propriety of the employment. The condition of things at the time must decide that. A party who acts according to the best lights that can be obtained at the moment is not negligent, but discreet. It is elementary that an agent is not permitted to reap any of the profits of his agency properly belonging to his principal; so, on the other hand, he is entitled to be indemnified against all losses which have been innocently sustained by him on the same account. Story, Ag. §§ 339, 340; Ewell's Evans, Ag. 473; Howe v. Railroad Co., 38 Barb. 124. The naked depositary ought neither to be injured nor benefited in any respect by the trust undertaken by him. In an emergency he has an implied authority to incur expenses on behalf of the owner for the preservation of the property. Edw. Bailm. § 66.

It is a familiar rule that an agent has the duty of taking such steps as are reasonably necessary for the protection of his principal's interests, and for the preservation of his principal's property, and that, having made outlays for that purpose, he is entitled to reimbursements at the hands of his principal. Story, Ag. § 335; Whart. Ag. § 314. The reason of the rule is that a request on the part of the principal is inferred where the advances are made in the regular course of business, or even on the spur of some pressing urgency not provided for by any rule, since the employer may fairly be taken to have authorized the employed to make the expenditure under any circumstances that a prudent man would conceive necessary for the safeguard of his interest. Smith, Merc. Law, § 169. In Harter v.

claimed adversely by another, he has reasonable ground to believe to belong to his principal.' Mechem on Agency, § 653."

An innocent agent who has been arrested and imprisoned for obeying the orders of his principal can recover from the principal damages therefor. Howe v. Buffalo, N. Y. & Erie R. Co., 37 N. Y. 297 (1867), affirming 38 Barb. 124 (1862).

[80] Accord: Carson v. Ely, 28 Mo. 378 (1859), where the condition of the goods demanded immediate expenditure by the agent to preserve them. Proper incidental charges and expenses for warehouse room, duties, freight, salvage, repairs, journeys, and other acts, to preserve the property, and to enable the agent to accomplish the objects of the principal are to be paid by him. Ruffner v. Hewitt, 7 W. Va. 585, 609 (1874).

Blanchard, 64 Barb. 617, the rule was applied to the case of a horse which, while in the bailee's possession, had his leg broken; and it was held that the bailee had, from the nature of the case, an implied authority to contract in behalf of the bailor with a competent farrier for the care of the animal. Indeed, this just rule of implied authority and indemnity pervades the law of principal and agent, and of bailments as well. The expenditure made by the Maverick National Bank was the proper exercise by it of the discretion conferred by the nature of the transaction. It was reasonable in amount, the services rendered were necessary, and there is no principle of justice that requires that it should lose the amount so paid. The expenditure was to protect the plaintiff's interest in the property; was made for his sole benefit, at a place far distant from his residence, and impliedly at his request. The expenditure, being a proper one, was legally authorized, and is a good counterclaim against the plaintiff; and, the cause of action for the balance of his demand having been legally discharged by payment into court, it follows that there must be judgment for the defendant, with costs from the time of such payment. Dakin v. Dunning, 7 Hill, 30, 42 Am. Dec. 33; Becker v. Boon, 61 N. Y. 332.

POWELL v. TRUSTEES OF VILLAGE OF NEWBURGH.

(Supreme Court of Judicature of New York, 1822. 19 Johns. 284.)

Special action on the case. The declaration contained the usual money counts, for costs and expenses paid out by plaintiffs while trustees of the village of Newburgh in defending a suit for closing a highway. They successfully defended the suit, but their successors, the present trustees, refused to reimburse them.

SPENCER, C. J. On the argument of the cause, I confess the inclination of my mind was strongly against the plaintiff's right to recover; but subsequent reflection and examination has led me to a different conclusion.

I will state some adjudged cases, that bear strong analogy to the present, and then deduce some general rules from them. In Ramsay v. Gardner, 11 Johns. 439, the defendant, being in want of money, applied to the plaintiff to inform him how he should draw a sum of money from a relation in Scotland; it resulted in the defendant's drawing a bill, which the plaintiff endorsed and negotiated; the bill was returned protested, and the plaintiff had to pay 20 per cent. damages. It was objected to the plaintiff's recovery, that the plaintiff was not authorized to sell the bill, but that having done so, and become liable in damages, it was his own fault, and he ought to bear the loss. It was decided, that the plaintiff acted as the defendant's agent in the negotiation of the bill, without any expected benefit;

that the damages were paid by the plaintiff as agent; and judgment was given for the plaintiff. In Exhall v. Patridge and others, 8 Term Rep. 308, the plaintiff's goods happened to be on premises chargeable with rent; they were distrained for rent in arrear, and the plaintiff was obliged to pay the rent to redeem them; it was held, that he might maintain an action for money paid to the use of the original lessees, who were bound by covenant to pay the rent. In Child v. Morley, 8 Term Rep. 610, the plaintiff, a broker, contracted, by the authority of the defendant, for the sale of stock at a future day; the defendant refused to make good the bargain by paying the difference, whereupon the plaintiff paid the difference, and brought his action against his employer; it was decided that the broker might recover in a special action on the case, but not on an implied promise, because he had paid the money voluntarily. In the case of D'Arcy v. Lyle, 5 Bin. 441, it was decided, that damages incurred by an agent, without his own fault, in the management of the principal's affairs, or in consequence of such management, must be borne by the principal. The case was thus: The plaintiff went to Cape Francois, with a power of attorney to demand a debt of Suckley & Co. there. On the voyage, the power of attorney was lost. He stated this to S. & Co. who consented to deliver up the goods of the defendant; but before the goods were delivered, they were attached by the creditors of S. & Co. The plaintiff interposed a claim in behalf of the defendant, and the goods were delivered to the plaintiff, by the decree of the Chamber of Justice. The plaintiff then sold the goods, and remitted the proceeds to the defendant. The plaintiff was, afterwards, compelled, in an arbitrary manner, and by duress, to let judgment go against him, at the suit of the attaching creditors, upon false allegations, and was compelled to pay them their claim. It was held, that the plaintiff might recover of the defendant, his principal, the amount thus paid, not exceeding the value of the defendant's goods. Ch. J. Tilghman expressed his approbation of the law, as laid down by Heineccius, b. 13, p. 269, 270, and 2 Ersk. Inst. 534, that damages incurred by an agent, or in the course of the principal's affairs, or in consequence of such management, were to be borne by the principal. It was admitted, that where an agent, on a journey, on business of his principal, was robbed of his own money, the principal would not be answerable, because carrying his own money was not necessarily connected with the business of his principal. So, if he received a wound, the principal is not bound to pay the expense of the cure, for it was the personal risk of the agent. The distinction appears to be, between those cases which arise naturally out of the agency, and such as are casual, or *oblique*, not proceeding directly from the execution of the mandate. Upon this principle stands the doctrine of contribution towards a general average; where the owner of a vessel cuts away a mast, to avoid impending

ruin, there the owners of goods are personally liable for the amount of contribution, on the ground that the act was done, by the general agent, for the safety of the property. In Stocking v. Sage et al., 1 Conn. 522, Ch. J. Swift laid down these principles, to which the other Judges agreed: "That where an agent, acting faithfully, without fault, in the proper service of the principal, is subjected to expense, he ought to be reimbursed. If sued on a contract made in the course of his agency, pursuant to his authority, though the suit be without cause, and he eventually succeeds, the law implies that the principal will indemnify him, and refund the expense; for this he can maintain an action of indebitatus assumpsit; and the proof of these facts will be sufficient to warrant the jury to find the promise." These principles are precisely applicable to this case: the plaintiffs were sued for an act done by them as the agents and trustees of the corporation, in the course of their agency, and pursuant to authority. They acted faithfully and without fault, and are entitled to recover, for every thing reasonably and necessarily disbursed in and about their defence and which could not be included in the taxation of costs, in the judgment recovered against Gardner.[81]

Judgment for the plaintiffs.

CLIFTON v. ROSS.

(Supreme Court of Arkansas, 1894. 60 Ark. 97, 28 S. W. 1085.)

Plaintiff, a blacksmith, at the request of defendant, a farmer, purchased for him a mill. No price was fixed by Ross, but he refused to take the mill because he feared it was too small. Clifton had purchased the mill in his own name, and was obliged to pay for it, and now sues defendant to recover the price. Judgment for defendant and plaintiff appealed.

RIDDICK, J.[82] [After stating the facts:] The question for us to determine is whether the circuit court erred in instructing the jury that if no price was agreed upon for the mill they must find for defendant. To constitute a sale it is not necessary that the parties agree on a price, for, if no price is fixed by the parties, the law implies that it shall be what the thing sold is reasonably worth. This is said to

[81] An agent who is sued on his principal's account need not let judgment go against him. He may defend and appeal the case, and the principal must reimburse him for all proper charges. First Nat. Bank v. Tenney, 43 Ill. App. 544 (1892); Selz v. Guthman, 62 Ill. App. 624 (1896), in which a sheriff was sued for levying on goods pointed out to him by his principal; Shearer v. Guardian Trust Co., 136 Mo. App. 229, 116 S. W. 456 (1909), in which an agent was sued on breach of a warranty. Neither need he wait to be sued, but he may pay damages without suit, and recover of his principal to the extent of the actual liability. Saveland v. Green, 36 Wis. 612 (1875).

[82] Part of the opinion is omitted.

be elementary law. Benj. Sales (Bennett's Ed.) 90, note; Taft v. Travis, 136 Mass. 95. But, if the testimony of Clifton is true, he did not sell the mill to Ross, but purchased it for him; and it is a general rule of law that all reasonable and necessary outlays and advances paid by an agent for his principal in the course of his employment must be repaid by the latter. Whart. Ag. §§ 313, 314; Mechem, Ag. 543; Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819. A request to undertake an agency or employment, the proper execution of which involves the expenditure of money on the part of the agent, operates not only as an implied request on the part of the principal to incur such expenditure, but also as a promise to repay it. Mechem, Ag. 544. If, without being induced by fraud or misrepresentation on the part of Clifton, Ross requested Clifton to purchase a mill, and Clifton, in the execution of such an undertaking, or as a result of it, was compelled to pay for the mill, then Ross is liable for such expenditure, if the same be reasonable, and this whether there was any price agreed upon or not. In the absence of any agreement or direction about the price to be paid, Clifton would, in such a case, ordinarily have the right to pay the fair market price for such mill, and to recover the same from Ross.[88] * * *

Judgment reversed.

[88] Accord: Greene v. Goddard, 9 Metc. (Mass.) 212 (1845), in which the agent was allowed to recover expenses incurred by reason of the failure of the drawee of bills drawn by the agent for the principal. The principal made good the face of the bills, but refused to pay the expenses. See Irions v. Cook, 33 N. C. 203 (1850), in which the third person refused to lease to the principal, and the agent took the lease in his own name and paid the interest, and Bibb v. Allen, 149 U. S. 481, 497, 13 Sup. Ct. 950, 37 L. Ed. 819 (1893).

The right of action does not accrue before the agent has paid the money. The obligation to pay the indemnity does not ripen into a cause of action before the thing to be indemnified against has happened. Otter Creek Lumber Co. v. McElwee, 37 Ill. App. 285 (1890).

As to recovery after termination of the agency, of money expended during the agency, see ante, p. 211 ff.; also, U. S. v. Jarvis, 2 Ware (Dav. 274) 278, Fed. Cas. No. 15,468 (1846), supra, p. 264, allowing the agent to recover for office rent and furnishings; Meyer v. Pulitzer Pub. Co., 156 Mo. App. 170, 136 S. W. 5 (1911), in which the court says: "The limitation on the rule above referred to recognizes the right of the principal to revoke the agency, but reckons with such equities as may have accrued in the agent's favor while acting in good faith toward executing the trust; for, though the principal may revoke an agency so given for an indefinite time, the circumstances of the case not infrequently present a situation in which there inheres a right to some compensation against the principal on the precepts of natural justice alone, notwithstanding the abstract right of revocation which the law generously concedes. In this view, even where an indefinite agency has been revoked, if it appears the agent, induced by his appointment, has in good faith incurred expense, devoted time, and bestowed labor in the matter of the agency without having a sufficient opportunity to recoup such outlays from the undertaking, the principal will be required to compensate him in that behalf, for the law will not permit one to thus deprive another of value without awarding just compensation. But the just principle acted upon by the courts in the circumstances suggested requires no more than in every instance the agent shall be afforded a reasonable opportunity to avail himself of the preliminary expenditure and efforts put forward to the end of executing the authority conferred, and, if it is denied him, that the principal should

BURBY v. ROOME.

(Common Pleas of New York City and County, 1894. 7 Misc. Rep. 167, 27 N. Y. Supp. 250.)

From judgment for plaintiff defendant appeals.

GIEGERICH, J. The plaintiff's assignor, one Schell, was the owner of certain premises in this city, and the defendant, Roome, was his agent to collect the rents of, and to care for, such property. Schell had sent the following letter of instructions to the defendant, who does not deny having received it: "New York, June 7, 1892. Mr. Roome—Dear Sir: Concerning my house, 131 West 25th street, I have made arrangements with Mantel, 32 Carmine St., to keep the roof in repair for one year, and with O'Brien & Ryder, plumbers, 154 Spring street, to attend to the plumbing work, tank, and engine for one year. * * * In case you need the services of any of these people at any time, to do any of the above work, please send for them, and they will do the work. [Signed] Edward P. Schell."

In January, 1893, the pipes, water-closets, etc., upon the premises were frozen up, and the services of a plumber were required. One Young was called in by the defendant's brother-in-law (who is admitted to have had authority to act for him in the matter) to do the work of repairing. Young's bill for his services amounted to $119.99, which defendant, after some delay, paid. Upon accounting to Schell for rents received, he retained this amount, for the recovery of which this action was brought. The answer was a general denial, and set up a counterclaim for said last-mentioned sum paid by him to Young for such services. The justice rendered judgment in favor of the plaintiff for the full amount claimed, and the defendant has brought this appeal.

In speaking of an agent's right to recover his disbursements, made for the benefit of his principal, Story, in his work on Agency (7th Ed. § 336, p. 412), says: "But this liability of the plaintiff proceeds upon the ground that the advances, expenses, and disbursements have been properly incurred, and reasonably and in good faith paid, without any default on the part of the agent. * * * However, if the agent has voluntarily and officiously, and without authority, made advances or payments, the principal will not be bound to any reim-

make compensation accordingly. Glover v. Henderson, 120 Mo. 367, 25 S. W. 175, 41 Am. St. Rep. 695; Royal Remedy Co. v. Gregory Grocer Co., 90 Mo. App. 53; Davis v. Barr, 12 N. Y. St. Rep. 111; Mechem's Agency, § 620. It is obvious that the principle reflected in the limitation on the rule above adverted to affords plaintiff no right of recovery, for his evidence is conclusive to the effect that he enjoyed the agency for 11 years, and it yielded to him a considerable profit during all of that time. It appears as well that no expenditure was made by him in that behalf other than the $45.46 paid out in the first instance to Burtscher, and this was recouped from his commissions while executing the agency in years gone by."

bursement thereof, for it will be imputed to the fault or negligence or unskillfulness of the agent."

As laid down in Fowler v. Bank, 67 N. Y. 138, 145, 146, the rule is that: "An agent is entitled to be indemnified against all damages and losses which are incurred by him, and all cost to which he may be subjected, in the course of his agency, without fault on his part." [84]

See, also, Monnet v. Heller (Super. N. Y.) 5 N. Y. Supp. 913.

Under these rules, the agent in the present case is not entitled to recover. Having acted in direct disobedience of his principal's instructions, he incurred the expenses clearly "without authority."

The judgment should be affirmed, with costs.

SECTION 3.—THE AGENT'S LIEN

BYERS v. DANLEY.

(Supreme Court of Arkansas, 1871. 27 Ark. 77.)

Suit in equity by Danley against Byers and others to quiet and perfect title, and for the possession and rents of certain lands. From a decree giving Danley possession an appeal is taken. One Smith, as agent of Northrop, purchased and paid for the lands. Northrop failed to pay Smith his compensation, expenses and reimbursement. After a long time Smith took possession of the land and paid taxes on it for 12 years, when he quitclaimed to Danley, who knew all the facts. He held the lands for five years and paid taxes until the commencement of this suit. Byers and the other defendants claimed under deeds from the original grantor and his assignees. These deeds plaintiff claimed were fraudulent.

BENNETT, J.[85] * * * It being evident, from the above agreement and authorities, that Smith can have no trust declared in his favor, it may be asked, inasmuch as he was the agent for Northrop and advanced the money to make the purchase, what equities he had for such advances, or what remedy had he against Northrop or the lands purchased?

[84] Accord: Beckman v. Wilson, 61 Cal. 335 (1882), in which an agent in charge of property rebuilt, after a fire; St. L., A. & T. H. R. Co. v. Thomas, 85 Ill. 464 (1877), in which an agent defended taking his principal's money on the ground that it had been turned over under compulsion to another employé. Money paid by an agent on a contract for his principal must be on the contract he was authorized to make, or he will not be entitled to reimbursement. Ross v. Clark, 18 Colo. 90, 31 Pac. 497 (1893). Money paid on a contract known by the agent to be illegal cannot be recovered. Thompson Bros. v. Cummings, 68 Ga. 124 (1881); Samuels v. Oliver, 130 Ill. 73, 22 N. E. 499 (1889). There can be no recovery for expenses caused by the agent's negligence, Veltum v. Koehler, 85 Minn. 125, 88 N. W. 432 (1901).

[85] Part of the opinion is omitted.

First, if Northrop was a non-resident of Arkansas, as alleged in the bill, he could have made out his account against him, attached it to the proper affidavit, under the statute, attached the lands and had them sold to pay the debt. See Gould's Digest, 163, §§ 1, 2, 3, etc. Here would have been a complete remedy at law.

Second, Smith could have sent his account to Illinois and there brought assumpsit for money paid for Northrop, at his request, and Northrop, not being insolvent, he in this way had another complete remedy at law.

Independent of these personal remedies, agents have, for the payment of their commissions, advances, disbursements and responsibilities, in the course of their agency, an established right, which in many cases becomes more important and effectual than any other means of remedial redress; that is to say, an agents' lien. Story, in his work on Agency, 433, defines this lien "to be a right in one man to retain that which is in his possession, belonging to another, until certain demands of him, the person in possession, are satisfied. It is a qualified right therefore, which may be exercised over the property of another person."

These liens of agents, like all liens, arise by operation of law. Chief Justice Gibbs, in Wilson v. Heather, 5 Taunt. 642, said: "The right of lien does not arise out of any contract whatsoever, but out of a right to hold property, until the party claiming the lien has been paid for the operation he performs."

Thus we see, if Smith was an agent of Northrop and, in carrying out the objects of his agency, he advanced money or incurred expenses for his principal, he had a lien and only a lien upon the title papers and the land for his commissions, services, expenses and advances, which grew out of this relation and was incident to Northrop's indebtedness to him. The extent of this was but a mere right to retain them until his demands were satisfied, and in this case, the property being real estate, he could retain it until the rents and profits had discharged the lien. In case of a mortgagee who ejects his mortgagor, he can only hold the lands until the rents and profits pay his debts or discharge his lien. So, if a mortgagor voluntarily surrenders the possession, no absolute estate passes to the mortgagee by virtue of his possession, but simply a right to retain the same for certain purposes nor is it any adverse holding so as to ripen into a title, except upon mere presumption of payment. 2 Hilliard on Mortgages, 16.

It cannot be contended that an agents' lien stands upon higher ground than that of a mortgage created by the solemn act of the parties.

Then Smith, having no title, could not convey a greater one to Danley, the appellee, and having merely a lien which could not exist for a moment without possession, it could not be transferred, and the effort of Smith to release the same to appellee, and delivering him the possession, as alleged in the bill, destroyed the lien and the appellee took nothing by his release. Story on Agency, §§ 360, 367. Hence,

appellee can have no title or right of possession to the lands in controversy by reason of Smith's lien.[86] * * *

Cause remanded, with instructions to dismiss the bill for want of equity.

UNDERHILL v. JORDAN.

(Supreme Court of New York, Appellate Division, First Department, 1902. 72 App. Div. 71, 76 N. Y. Supp. 266.)

Action for an accounting by Edward C. Underhill against Nina Jordan and another. From a judgment for defendants, plaintiff appeals. Reversed.

The complaint in this action avers that the plaintiff, from about the 30th day of April, 1886, to on or about the 11th day of May, 1901, acted as the agent, factor, and manager of the defendants under authority of a written power of attorney; that plaintiff, under such power of attorney, had the entire management of the property of said defendants, the corpus of which originally amounted to $87,766, and that by his judicious handling of the same it increased to the sum of $93,266; that during the time that plaintiff has been so employed he has received and collected the sum of $159,109.42, all of which he has turned over to the defendants, except the sum of $7,955.42, which he now has in his possession, and upon which he claims a lien for his services and expenses paid in the management of said agency; that plaintiff believes that the reasonable value of his said services is $7,955.42; that he is ready, willing, and able to account for and pay over to said defendants so much of said sum as the court shall decide, in case it shall decide he is not entitled to the whole thereof; that no agreed price has ever been fixed upon with defendants for his said services, and that he has necessarily expended in the management of said property the sum of $5,592, for which he has had no recompense; that defendants during all the times aforesaid had been, and now are, residing in Europe, and that he fears that, if he should not claim a lien upon the amount retained for his services and expenses, and should pay over the same to the defendants, they would remove the same out of the jurisdiction of this court, and that said defendants could only be served with process in a foreign jurisdiction. Wherefore plaintiff demands judgment for $13,547.98, and that plaintiff's lien upon the said sum of $7,955.42 for the amount of the value of said services and disbursements be defined and enforced against said sum; that plaintiff

[86] Accord: Cranston v. Philadelphia Ins. Co., 5 Bin. 538 (1813). Chickering v. Hosmer, 12 Mass. 183 (1815).

An agreement to give credit, or any contract inconsistent with a lien, is a waiver of it. Stoddard Woolen Manufactory v. Huntley, 8 N. H. 441, 31 Am. Dec. 198 (1837); Hall v. Jackson, 20 Pick. 194 (1838). Cf. Welker v. Appleman, 44 Ind. App. 699, 90 N. E. 35 (1909), in which the contract was found not to be inconsistent. One of the earliest cases recognizing an agent's lien (in this case a factor's) is Kruger v. Wilcox, Ambler 252 (1755), cited in Newhall v. Dunlap, 14 Me. 180, 31 Am. Dec. 45 (1841).

have judgment against said defendants for whatever sum he may be entitled to above said sum of $7,955.42; and that the defendants be restrained from interfering with said last-mentioned sum until the determination of this action; and for such other and further relief as to the court shall seem just and equitable. The defendants demurred to the complaint upon the ground that it failed to state facts sufficient to constitute a cause of action, which demurrer the court below sustained, and from the judgment entered therein dismissing the complaint this appeal is taken.

HATCH, J.[87] * * * We are also of opinion that sufficient facts are alleged in this complaint to establish a lien in favor of the plaintiff upon the fund in question, at least to the extent of his claim for expenses and disbursements paid out by the plaintiff in its management. In Muller v. Pondir, 55 N. Y. 325, 14 Am. Rep. 259, it was said by Judge Allen: "An agent may have a lien on the property of his principal for moneys advanced or liabilities incurred in his behalf; and, if moneys have been advanced or liabilities incurred upon the faith of the solvency of the principal, and he becomes insolvent while the proceeds and fruit of such advances or liability are in the possession of the agent, or within his reach, and before they have come to the actual possession of the principal, within every principle of equity the agent has a lien upon the same for his protection and indemnity. If necessary to his protection, the plaintiff would have been permitted to repudiate the agency, and assume that position which would best protect himself from loss by reason of the insolvency of his principal."

The evident reason why the lien is given is that by the expenditure made and liabilities assumed the agent has benefited the principal, and protected the fund, or, at least, improved the principal's condition. As the irresponsibility of the principal would defeat the right of the agent in securing reimbursement, equity raises out of such situation for his protection a lien upon the fund. It must follow, therefore, that whenever a condition exists which would cause loss to the agent if he parted with the funds in his hands, equity will interpose so far as to protect the agent's right in the premises, and raise out of the condition a lien upon the fund. The complaint avers that the defendants are residents of England, and that, if he parts with the possession of the money, it will be removed beyond the jurisdiction of the court and its process. In such case the same reasons exist for supporting a lien upon the fund as would exist in the case of insolvency. It seems clear, therefore, that this complaint states a perfectly good cause of action for equitable interposition.

It follows that both the final and interlocutory judgments should be reversed, with costs to the plaintiff in this court and in the court below, and leave given to the defendants to answer within 20 days, upon the payment of such costs.

[87] The rest of the opinion is on page 818.

CHAPTER III

LIABILITY OF THE AGENT TO THE THIRD PERSON

SECTION 1.—IN CONTRACT

I. GENERAL RULE

ANDERSON v. TIMBERLAKE.

(Supreme Court of Alabama, 1896. 114 Ala. 377, 22 South. 431, 62 Am. St. Rep. 105.)

Action on the common counts by Timberlake against Anderson. The latter was in fact a mere agent of the North Alabama Lumber Company running their "Crow Creek Mill." Timberlake furnished money to pay the hands, and goods and merchandise for the mill. The company was bankrupt and plaintiff testified that he gave credit solely to Anderson. There was much evidence contra.

BRICKELL, C. J.[1] The legal presumption is, when a known agent deals or contracts within the scope of his authority, that credit is extended to the principal, and not to the agent; and that the dealing is the act, or the contract is the engagement, of the principal alone, as if he were personally present and acting or contracting. This presumption prevails in the absence of evidence that credit was given to the agent exclusively, and the burden of proof rests upon the party seeking to charge him personally. If the contract or promise is in writing, its construction and effect are, ordinarily, questions of law for the decision of the court. But when the contract or promise is verbal, the question whether the credit was given to the agent in exclusion of the credit of the principal is a question of fact, for the determination of the jury, to be ascertained from a consideration of all the circumstances attending the transaction. Mechem, Ag. § 558; 1 Am. & Eng. Enc. Law (2d Ed.) 1119, 1120; Whitney v. Wyman, 101 U. S. 392, 25 L. Ed. 1050. In 1 Am. Lead. Cas. (5th Ed.) 764, speaking in reference to verbal contracts made by or through an agent, it is said that: "When the relation of principal and agent exists in reference to a contract, and is known to the other party to exist, and the principal is disclosed at the time as such, the contract is the contract of the principal, and the agent is not bound, unless credit has been given to him expressly and exclusively, and it was clearly

[1] Part of the opinion is omitted.

his intention to assume a personal responsibilty;[2] but if credit was given to him exclusively, and he intended to give his own personal engagement, he will be bound; and this, upon sufficient evidence, is a question for the jury, on all the circumstances of the case." In the recent case of Humes v. Furnace Co., 98 Ala. 461, 13 South. 368, it was said by Coleman, J.: "To hold an agent personally liable in cases in which he discloses his principal, and that the services to be rendered are for the sole benefit of the principal, and the contract is within the scope of his authority, it must be shown that the credit was given exclusively to the agent, and that the agent was informed of that fact."

Applying this well-settled principle, the instructions to the jury, given at the instance of the plaintiff, numbered 1, 2, and 4, are essentially erroneous. They proceed, manifestly, on the theory that the principal, the North Alabama Lumber & Manufacturing Company, and the defendant, as agent, were or could be bound, jointly or severally, by the same contract or engagement, or that the promise of the one could be collateral to the promise of the other, while the true inquiry—an inquiry to be solved by the jury upon a consideration of the course of dealing between the parties, and all the attending facts and circumstances—was whether any credit was given to the principal, or whether it was given exclusively to the defendant, and it was his intention to become the sole debtor to the plaintiff. The fact that the defendant, at the commencement of the transaction from which the account originated, may have directed the accounts, as created, to be charged to him, or to himself and Kilpatrick, to which so much of prominence is given by the instructions, is far from being decisive that he intended to become the sole debtor, or a debtor jointly with Kilpatrick, to the exclusion of all liability on the part of the North Alabama Lumber & Manufacturing Company. Nor is it decisive that the plaintiff did not extend any credit whatever to that company. The purpose of the direction may have been only to separate and distinguish the accounts the defendant was creating as agent from the individual dealings he was having, or might have, with the plaintiff. As a fact, the direction is for the consideration of the jury, to be taken in connection with all other facts and circumstances attending the dealings between the parties, in ascertaining whether exclusive credit was extended to the defendant, and whether, with knowledge of that fact, he intended to assume individual responsibility. * * *

Reversed and remanded.

[2] In Tiller v. Spradley, 39 Ga. 35 (1869), Warner, J., quotes the rule as stated by Ch. Kent: "It is a general rule, standing on strong foundations, and pervading every system of jurisprudence, that where an agent is duly constituted and names his principal, and contracts in his name, the principal is responsible, and not the agent." 2 Kent's Com. 630.

HOVEY v. PITCHER.

(Supreme Court of Missouri, 1850. 13 Mo. 191.)

Assumpsit to recover $200, which it was alleged Hovey agreed to pay if plaintiff, as sheriff, would add this to the $300 reward he was about to offer for the apprehension and delivery of an escaped prisoner wanted on a charge of murder. Plea the general issue, and judgment for plaintiff.

NAPTON, J.[a] The principal and most important objection to the judgment in this case arises from the instructions which the court gave on the subject of agency. The defendant introduced proof to show that he made no contract with Pitcher, in relation to the reward offered by the latter for the apprehension and delivery of Harper, and also some evidence to show that, if he made any, it was in the character of an agent for Meredith. The Circuit Court gave two instructions on this subject, one at the instance of plaintiff, and the other asked by the defendant. The latter was correct, the former not.

It does not follow, because a person discloses himself to be an agent, and gives the name of his principal, that he is therefore not personally liable. The person with whom he is dealing may be unwilling to trust the principal, and yet willing to contract with the agent, upon his personal responsibility; and it then becomes a question of fact, to be determined by the circumstances of the case, whether the credit was given to the agent or not. The conversation and acts of the parties, at the time of the contract, must necessarily be evidence, indeed, in the absence of any written agreement, the only evidence of what the contract was. These are the res gestæ—the contract itself. The admission of such testimony does not impair, to the slightest extent, that well settled rule that a party cannot make evidence for himself; that his declarations in his own favor are not admissible. This rule is understood to be confined to declarations and acts ex post facto, if I may be allowed the phrase—made in the absence of the party contracted with and after the transaction has passed away.

The second instruction given at the plaintiff's instance is certainly obscure; but if I understand it aright, it is calculated to mislead. The premises laid down in the first branch of the instruction are followed by a conclusion, which seems to have no bearing upon the case, and so far might be regarded as harmless, but a second sequence is drawn from them in the concluding paragraph, which not only makes the meaning of the entire instructions very obscure, but is in itself erroneous. Had the jury been told that the defendant's declarations that he was agent, and was authorized to offer a reward, were not sufficient of themselves to authorize a verdict in his favor, no objection could have been made to the proposition. For these facts may

[a] Part of the opinion is omitted.

have existed, and yet the plaintiff may not have thought proper to give Meredith credit, and may have preferred contracting with the defendant. There was evidence to warrant this hypothesis and counter evidence which the jury were to determine. But the instruction proceeds to direct the jury that from such declarations alone, unsupported by other evidence, they must not find Hovey an agent. It was immaterial whether Hovey was agent or not; that is, whether he was an authorized agent or not. The controversy was not between him and his supposed principal, but between him and a third party, claiming to have contracted with him upon his individual responsibility, and the material question was, Did the parties so contract or was the contract made with Hovey as the agent of Meredith? The instruction concludes with a distinct and independent proposition: "And unless the jury believe from other evidence that the said declarations of Hovey that he offered the reward as such agent, they must find for plaintiff." This last clause was certainly calculated to mislead. Hovey's declarations to Pitcher or Pitcher's agent, Heard, were undoubtedly evidence of the understanding between them, as well as what was said by Pitcher or Heard. To enable the jury to ascertain the intent of both parties, it was proper for them to know all that passed between them at the time of the supposed contract. Declarations made by Hovey at other times and to other persons would of course be inadmissible. * * *

Reversed and remanded.

II. UNAUTHORIZED CONTRACTS

SMOUT v. ILBERY.

(Court of Exchequer, 1842. 12 L. J. Exch. 357, 10 Mees. & W. 1.)

Debt for goods sold and delivered, and on an account stated. Verdict for plaintiff, and defendant obtained a rule to show cause why a new trial should not be had.

ALDERSON, B.[4] This case was argued at the Sittings after last Hilary Term, before my brothers Gurney, Rolfe, and myself. The facts were shortly these. The defendant was the widow of a Mr. Ilbery, who died abroad; and the plaintiff, during the husband's lifetime, had supplied, and after his death had continued to supply, goods for the use of the family in England. The husband left England for China in March, 1839, and died on the 14th day of October, in that year. The news of his death first arrived in England on the 13th day of March, 1840; and the only question now remaining for the decision of the Court is, whether the defendant was liable for the goods supplied after her husband's death, and before it was possible that the knowledge of that fact could be communicated to her.

[4] Part of the opinion is omitted.

There was no doubt that such knowledge was communicated to her as soon as it was possible; and that the defendant had paid into Court sufficient to cover all the goods supplied to the family by the plaintiff subsequently to the 13th March, 1840.

We took time to consider this question, and to examine the authorities on this subject, which is one of some difficulty. The point, how far an agent is personally liable who, having in fact no authority, professes to bind his principal, has on various occasions been discussed. There is no doubt that in the case of a fraudulent misrepresentation of his authority, with an intention to deceive, the agent would be personally responsible. But independently of this, which is perfectly free from doubt, there seem to be still two other classes of cases, in which an agent who without actual authority makes a contract in the name of his principal, is personally liable, even where no proof of such fraudulent intention can be given. First, where he has no authority, and knows it, but nevertheless makes the contract as having such authority. In that case, on the plainest principles of justice, he is liable. For he induces the other party to enter into the contract on what amounts to a misrepresentation of a fact peculiarly within his own knowledge; and it is but just, that he who does so should be considered as holding himself out as one having competent authority to contract, and as guarantying the consequences arising from any want of such authority. But there is a third class, in which the Courts have held, that where a party making the contract as agent bona fide believes that such authority is vested in him, but has in fact no such authority, he is still personally liable. In these cases, it is true, the agent is not actuated by any fraudulent motives; nor has he made any statement which he knows to be untrue. But still his liability depends on the same principles as before. It is a wrong, differing only in degree, but not in its essence, from the former case, to state as true what the individual making such statement does not know to be true, even though he does not know it to be false, but believes, without sufficient grounds, that the statement will ultimately turn out to be correct. And if that wrong produces injury to a third person, who is wholly ignorant of the grounds on which such belief of the supposed agent is founded, and who has relied on the correctness of his assertion, it is equally just that he who makes such assertion should be personally liable for its consequences.

On examination of the authorities, we are satisfied that all the cases in which the agent has been held personally responsible, will be found to arrange themselves under one or other of these three classes. In all of them it will be found, that he has either been guilty of some fraud, has made some statement which he knew to be false, or has stated as true what he did not know to be true, omitting at the same time to give such information to the other contracting party, as would enable him equally with himself to judge as to the authority under which he proposed to act.

Of the first, it is not necessary to cite any instance. Polhill v. Walter, 3 B. & Ad. 114, is an instance of the second; and the cases where the agent never had any authority to contract at all, but believed that he had, as when he acted on a forged warrant of attorney, which he thought to be genuine, and the like, are instances of the third class. To these may be added those cited by Mr. Justice Story, in his book on Agency, p. 226, note 3. * * *

The present case seems to us to be distinguishable from all these authorities. Here the agent had in fact full authority originally to contract and did contract in the name of the principal. There is no ground for saying, that in representing her authority as continuing, she did any wrong whatever. There was no mala fides on her part—no want of due diligence in acquiring knowledge of the revocation—no omission to state any fact within her knowledge relating to it, and the revocation itself was by the act of God. The continuance of the life of the principal was, under these circumstances, a fact equally within the knowledge of both contracting parties. If, then, the true principle derivable from the cases is, that there must be some wrong or omission of right on the part of the agent, in order to make him personally liable on a contract made in the name of his principal, it will follow that the agent is not responsible in such a case as the present. And to this conclusion we have come. We were, in the course of the argument, pressed with the difficulty, that if the defendant be not personally liable, there is no one liable on this contract at all; for Blades v. Free, 9 B. & Cr. 167, 4 Man. & Ry. 282, has decided, that in such a case the executors of the husband are not liable. This may be so: but we do not think that if it be so, it affords to us a sufficient ground for holding the defendant liable. In the ordinary case of a wife who makes a contract in her husband's lifetime, for which the husband is not liable, the same consequence follows. In that case, as here, no one is liable upon the contract so made.

Rule absolute accordingly.

DUSENBURY v. ELLIS.

(Supreme Court of Judicature of New York, 1802. 3 Johns. Cas. 70, 2 Am. Dec. 144.)

In error on certiorari from a Justice's Court. Judgment for plaintiff on a note signed by Dusenbury "for Peter Sharpe."

PER CURIAM. There can be no question but that Dusenbury signed the note, without having any authority for that purpose. The letter of attorney could not bind the principal beyond the plain import of it. An authority to collect debts cannot, by any possible construction, be an authority to give notes.

The only question, then, is, whether Dusenbury was not personally responsible, as for his own note. On this point we are of opinion that if a person, under pretence of authority from another, executes

a note in his name, he is bound; and the name of the person for whom he assumed to act will be rejected, as surplusage. The party who accepts of a note, under such mistake or imposition, ought to have the same remedy against the attorney, who imposes on him, as he would have had against the pretended principal, if he had been really bound.

Judgment of affirmance.

HALL et al. v. CRANDALL et al.

(Supreme Court of California, 1866. 29 Cal. 567, 89 Am. Dec. 64.)

Action on a promissory note made for the Auburn Turnpike Company by its president, the defendant.

SANDERSON, J.[5] * * * But upon this head it is sufficient to say that the present action is founded strictly upon the note itself, and not upon the wrong done to the plaintiffs by the defendants in executing it without authority; and we are of the opinion that if the defendants have, by their action in the premises, incurred a personal liability at common law, such liability does not arise from any obligation created by the note itself, but from the wrong done. In all such cases, the remedy against the agent is an action to recover the money, if any has been paid him, or the value of the work or labor, if any has been performed for him, under the supposed contract, or special damages resulting to the plaintiff by reason of the defendants' wrong in undertaking to act for another without authority. If an agent in executing a contract, employ terms which in legal effect, charge himself, he may be sued upon the instrument itself as a contracting party. This is so because by the use of such terms, he has made the contract his own. But if the instrument does not contain such terms, or in other words contains language which in legal effect bind the principal only, the agent cannot be sued on the instrument itself for the obvious reason that the contract is not his. If then the contract is not binding upon the principal because the agent had no authority to make it, and is not binding on the agent because it does not contain apt words to charge him personally, it is wholly void.

Upon this point there is some conflict of authority, but the better reason, in our judgment, is with those cases which hold the rule to be as above stated. Story on Agency (5th Ed.) § 264a, and marginal notes, where the authorities are collected; 1 Parsons on Contracts, 54 to 58; Abbey v. Chase, 6 Cush. 54. See, also, Sayre v. Nichols, 7 Cal. 538, 68 Am. Dec. 280; Davidson v. Dallas, 8 Cal. 227; Haskell v. Cornish, 13 Cal. 47; Shaver v. Ocean Min. Co., 21 Cal. 45, which will be found to bear in some degree upon the question. Those

[5] Part of the opinion is omitted.

cases, which hold that the agent may be sued upon the contract itself, treat all matter which the contract contains in relation to the principal as surplusage, which is, in effect, to make a new contract for the parties concerned instead of construing the one which they themselves have made.

The contract in the present case is not binding upon the supposed principal (the company) because the supposed agents (the defendants) had no authority to make it, as we held in Hall v. Auburn Turnpike Co., 27 Cal. 255, 87 Am. Dec. 75. It is not binding upon the defendants, because it does not contain apt words to charge them. From the terms employed, the contract is manifestly the contract of the company and not the defendants. It is clear upon inspection of the instrument that the defendants intended to bind the company and not themselves, and that the plaintiffs so understood it. This action therefore being ex directo against the defendants on the note itself, cannot, in our judgment, be sustained at common law for reasons which have been already stated.[6] Upon the question whether the plaintiff can make a case which will charge the defendants at common law, we intimate no opinion. * * *

Judgment dismissing the case affirmed.

III. On What Contract Liable

HAUPT v. VINT.

(Supreme Court of Appeals of West Virginia, 1911. 68 W. Va. 657, 70 S. E. 702, 34 L. R. A. [N. S.] 518.)

Action by Haupt, payee of a note, against Vint, maker of the note, the De Ran Lumber Company, indorser on the note, and J. J. De Ran, by whom the indorsement was made. Judgment for plaintiff, and defendant Lumber Company brings error.

POFFENBARGER, J.[7] * * * Both the declaration and the proof show that the De Ran Lumber Company is a corporation. It is sued as such, and there is no proof of authority in J. J. De Ran, its manager, by whom the indorsement was made, or any other person, to bind it by an accommodation indorsement, guaranty, or suretyship, nor evidence sufficient to establish an original promise by the corporation. As a general rule, corporations cannot lend their credit in the form of accommodation indorsements, suretyships, and guar-

[6] Accord: Jefts v. York, 10 Cush. 392 (1852), per Shaw, C. J. Though no one is liable on the contract, the agent may however be liable in case for misrepresenting his authority. McCormick v. Seeberger, 73 Ill. App. 87 (1898); Bartlett v. Tucker, 104 Mass. 336, 6 Am. Rep. 240 (1870); Duncan v. Niles, 32 Ill. 532, 83 Am. Dec. 293 (1863); Simpson v. Garland, 76 Me. 203 (1884).

[7] Part of the opinion is omitted.

anties. To fix such a liability upon a corporation, it is necessary to establish, not only authority in the officer or agent to execute the paper, but also power in the corporation to bind itself in that way. This rule is universally applied to banking, insurance, railroad, plank road, and other transportation companies, manufacturing companies, and building and loan associations. It would be useless to consume space here in citing the decisions declaring and applying this law. They are collated in 10 Cyc. 1109; 7 A. & E. Enc. L. 788; Morawetz, Corp. §§ 389, 423; Cook, Corp. § 761; Clark, Corp. § 184, p. 486.

As J. J. De Ran, by whom the indorsement was made, has been made a defendant, it becomes necessary to determine, for the purposes of a new trial, whether his lack of authority to bind his principal makes him personally liable. Though it has been held that a person who has signed the name of another to a note or other contract without authority is liable thereon as promisor or covenantor (Edings v. Brown, 1 Rich. 255; Dusenbury v. Ellis, 3 Johns. Cas. 70, 2 Am. Dec. 144), reason and the weight of authority are to the contrary, and make him liable, not on the instrument, as a party to it, but only as a warrantor of the signature, against whom assumpsit, sounding in damages, lies, or as a wrongdoer, making him liable in trespass on the case for fraud and deceit. Ballou v. Talbot, 16 Mass. 461, 8 Am. Dec. 146; White v. Madison, 26 N. Y. 117; Dung v. Parker, 52 N. Y. 499; Clark & Skyles, Agency, § 575; 1 A. & E. Enc. L. 1128; 31 Cyc. 1614, 1615, saying: "As to the ground upon which the liability of an agent contracting for another without authority rests, the authorities in the several states differ widely, nor is it easy to reconcile the various decisions in the same state. In some jurisdictions, particularly in the earlier cases, it is held that an action may be maintained against the agent as principal upon the contract itself, although it contains no apt words to bind him personally, but only to bind the principal, upon the theory that the contract must have been intended to bind some one; if not the principal, then the agent. By the great weight of recent authority, however, this theory has been emphatically repudiated, and it is now generally held, more logically, that the agent cannot be held upon the contract unless it contains apt words to bind him personally, in the absence of which the only remedy is by an action for the breach of his implied warranty or an action for deceit if the circumstances warrant the latter remedy." * * * Reversed and remanded.

HANCOCK v. YUNKER.

(Supreme Court of Illinois, 1876. 83 Ill. 208.)

SCHOLFIELD, J. Two questions are presented by this record for our determination:

First—Does the covenant in the lease to pay rent purport to be the covenant of the defendants, individually?

Second—If the defendants did not, in fact, bind a legally organized corporation by the terms of the lease, are they, themselves, liable to an action of covenant upon it?

As to the first point, we think it clear the covenants in the lease, on behalf of the lessee, do not purport to be the covenants of the defendants, individually. N. W. Distilling Co. v. Brant, 69 Ill. 658, 18 Am. Rep. 631. The case is not analogous to Powers v. Briggs et al., 79 Ill. 493, 22 Am. Rep. 175, and other cases of like tenor cited by the counsel for the plaintiff.

The evidence shows that "The Chicago Literary Association" was organized as a corporation, de facto, at least. It was the lessee, and by it, its associates, successors and assigns, are all the covenants that relate to the payment of rent, taxes, rates, care and repair of the premises, and surrender of possession, etc., to be performed. And, at the conclusion of the lease, it is recited, the party of the first part, the plaintiff, signs in his own proper person, and the party of the second part, which is "The Chicago Literary Association," signs "through its trustees." It is thus seen, the entire phraseology of the instrument expressly excludes the idea of an intentional personal liability, and is such as is appropriate and ordinarily used to express corporate liability.

Upon the second point there is no doubt that "the signature of an agent amounts to an affirmation that he has authority to do the particular act, or, at all events, that he, bona fide, believes himself to have that authority." Story on Agency, § 264. But the question here is not whether these defendants may be held liable to the plaintiff in a *proper form of action,* but whether they are liable in *this form of action*—i. e., covenant upon the lease.

Story, in the work just quoted from, § 264a, says: "It seems clear that in no case can an agent be sued on the very instrument itself, as a contracting party, unless there are apt words therein so to charge him. Thus, if a person acting as agent for another should, without authority or exceeding his authority, make and execute a deed in the name of his principal, and not in his own name, the agent would not be liable thereon, although it would not bind the principal." But he further says, where there are apt words which may charge him personally, and yet he signs the same, in his own name, as agent of another, the question may be presented under a different aspect, and he gives this example: "If an agent should, without due authority, make

a promissory note, saying in it, 'I promise to pay,' etc., and sign it C. D., by A. B., his agent, or 'A. B., agent of C. D.,' in such a case may the words as to the agency be rejected, and the agent be held personally answerable as the promisor of the note?" "Upon this point," he says, "the authorities do not seem to be entirely agreed." The same, in substance, will be found in Chitty on Contracts (11th Am. Ed.) 314. See, also, Stetson v. Patten, 2 Greenl. 358, 11 Am. Dec. 111; Ballou v. Talbott, 16 Mass. 461, 8 Am. Dec. 146; Delius v. Cawthorn, 13 N. C. 90; Abbey v. Chase, 6 Cush. 56, 57; Moor v. Wilson, 26 N. H. 332; American Leading Cases (5th Ed.) Notes to Rathbon v. Budlong, 767, side p. 636.

The question under consideration was not before the court in Wheeler v. Reed, 36 Ill. 81, nor in Mann et al. v. Richardson, 66 Ill. 481, and what was there said affecting it was by way of argument merely, and, so far as intended to announce a principle, must be understood as restricted to cases where there are apt words in the instrument to charge the agent personally, by rejecting the words descriptive of his agency as surplusage.

In Duncan v. Niles, 32 Ill. 532, 83 Am. Dec. 293, the court quoted with approval, however, this language from the opinion of the court in Abbey v. Chase, supra, and predicated the decision upon it, and upon other cases of like tenor: "When one who has no authority to act as another's agent assumes so to act, and makes either a deed or a simple contract in the name of the other, he is not personally liable on the covenants in the deed, or on the promise in the simple contract, unless it contain apt words to bind him personally. The only remedy against him in this commonwealth, is an action on the case for falsely assuming authority to act as agent."

It is true, in that case the agent sought to be held personally responsible assumed to act as the agent of a public corporation, and there is a distinction between the measure of liability imposed upon public and private agents; but the authorities referred to and relied upon apply, so far as the *form of the remedy* is concerned, as well to private as to public agents.

We regard what is quoted from Story, supra, as a correct statement of the result of the authorities, and think it is not inconsistent with anything that has been heretofore decided by this court.

Inasmuch, therefore, as the undertaking to perform the covenants in the lease of the party of the second part assumes to be that of "The Chicago Literary Association" alone, and there are no apt words from which an individual undertaking can be implied,[8] if we shall reject the

[8] Accord, see the late case of Roberts v. Tuttle, 36 Utah, 614, 105 Pac. 916 (1909).

In some cases, particularly early American cases, the agent is held on the contract with the third person as though it were his personal contract. Gillaspie v. Wesson, 7 Port. 454, 31 Am. Dec. 715 (1838); Byars v. Doores' Adm'r, 20 Mo. 284 (1855); Meech v. Smith, 7 Wend. 315 (1831). This is sometimes justified on the ground that by striking out of the contract the parts which

name "The Chicago Literary Association" wherever it occurs, we must hold that the defendants cannot be held individually responsible in the present action on the lease, and affirm the judgment.

Judgment affirmed.

THILMANY v. IOWA PAPER BAG CO. et al.

(Supreme Court of Iowa, 1899. 108 Iowa, 357, 79 N. W. 261, 75 Am. St. Rep. 259.)

Action to recover the price of a car load of paper shipped by plaintiff to the Bag Company. Daggett as vice president of a bank had written plaintiff a letter of guaranty on the strength of which the paper had been shipped. The Bag Company was insolvent, and it had been decided in a previous action that a national bank could not make such a guaranty, and therefore was not liable. Plaintiff now seeks to make Daggett personally liable.

DEEMER, J.[9] * * * We now turn to the main point in the case, and first to the proposition that defendant Daggett is liable because of the form of the guaranty. It is signed, "Iowa National Bank, by William Daggett, V. P." Clearly, this is an obligation of the company; and the form of the signature just as clearly indicates that Daggett signed it in a representative capacity, and not as an individual. To hold that the contract binds Daggett personally, we must eliminate the preposition "by," and hold that the initials "V. P." are "descriptio personæ." This we cannot do, as it is not our province to make contracts for parties. The use of the pronouns "we" and "our" in the letter of guaranty is of no significance. They are often used in referring to a corporation as a collection of individuals. There is no question in our minds but that all the parties to this contract regarded it as the obligation of the bank, and not of the defendant Daggett in

the agent had no authority to put there the remainder clearly binds the agent. Weare v. Gove, 44 N. H. 196 (1862). An interesting discussion of this theory is found in Simmonds v. Long, 80 Kan. 155, 101 Pac. 1070, 23 L. R. A. (N. S.) 553 (1909). Many cases make no distinction between an action against the agent on the unauthorized contract made for the principal and an action based on the implied warranty of authority. Kroeger v. Pitcairn, 101 Pa. 311, 47 Am. Rep. 718 (1882). In others liability of the agent when apt words to bind him are not used must be in case, for his fraud or misrepresentation. In such a case, in the absence of misrepresentation, there is no liability. Ogden v. Raymond, 22 Conn. 379, 58 Am. Dec. 429 (1853). And others, though recognizing that the liability really rests upon the latter, still refuse to set aside a judgment against the agent because it was based upon a breach of the wrong contract. Such an error is not prejudicial to the agent's rights, and is immaterial. Oliver v. Morawetz, 97 Wis. 332, 72 N. W. 877 (1897).

Still others, particularly the English courts, are inclined to deny relief against the agent if the action is brought on the contract itself, when it contains no apt words to bind him. Jenkins v. Hutchinson, 13 Q. B. 744, 13 Jur. 763, 18 L. J. Q. B. 274, 66 E. C. L. 744 (1849). The agent may be liable in another form of action, but not upon the contract itself. Simpson v. Garland, 76 Me. 203 (1884).

[9] Part of the opinion is omitted.

his individual capacity; and, as this is the proper legal construction of the instrument, nothing further need be said on the first proposition urged by appellant's counsel.

2. As to the second proposition, the rule has been broadly stated over and over again that when an agent contracts in excess of his authority, or acts without authority, or assumes to have authority when he has none, or for any reason fails to bind his principal, he is himself bound. Winter v. Hite, 3 Iowa, 142; Allen v. Pegram, 16 Iowa, 163; Andrews v. Tedford, 37 Iowa, 314; Lewis v. Tilton, 64 Iowa, 220, 19 N. W. 911, 52 Am. Rep. 436. That this is the general rule must be conceded, and, as applied to the facts of the cited cases, it is correct. But, like nearly every other general rule, it is subject to exceptions, some of which we will notice.

The reasons generally given for the rule are: First, That, as an agent assumes to represent a principal, he cannot be heard to say that he had no authority, or that there was in fact no principal to be bound; for, if he assumes to represent another, he impliedly warrants that there is such another, and that he has authority to represent him. If, then, there is no principal, or the agent has no authority to act for him, an action will lie for deceit or misrepresentation. Second. The law assumes that the contract was intended to bind some one, and, if the principal is not bound, the contract must be that of the agent. This last rule is generally applied to executed contracts, and an action will lie for benefits received by the agent. Some cases go to the extent of rejecting all parts of the contract relating to the obligation of the principal, and then treat it as the personal contract of the agent. As illustrating this rule, see Byars v. Doores, 20 Mo. 284; Woodes v. Dennett, 9 N. H. 55; Terwilliger v. Murphy, 104 Ind. 32, 3 N. E. 404. A third reason for the rule is that the agent impliedly warrants his authority to act for his principal, and, if he has no such power, an action lies for breach of warranty.

Now, it is apparent that if the party with whom the agent contracts has notice of the facts relating to the authority of the agent, and is as fully advised as to his authority as the agent himself, there can be no action for deceit. And so the text writers have generally stated this as an exception to the general rule. Mechem on Agency, at sections 545 and 546, thus states the law:

"Sec. 545. * * * Of course, if the other party knew, or by the exercise of reasonable care might have discovered, the want of authority, he cannot recover. This implied warranty by the agent of his authority must ordinarily be limited to its existence as a matter of fact, and not be held to include a warranty of its adequacy or sufficiency in point of law.

"Sec. 546. Where Agent Discloses All the Facts Relating to His Authority. Where, however, the agent, acting in good faith, fully discloses to the other party at the time all the facts and circumstances touching the authority under which he assumes to act, so that the other

party, from such information or otherwise, is fully informed as to the existence and extent of his authority, he cannot be held liable. It is material, in these cases, that the party claiming a want of authority in the agent should be ignorant of the truth touching the agency. If he has full knowledge of the facts, or of such facts as are sufficient to put him upon inquiry, and he fails to avail himself of such knowledge, or of the means of knowledge reasonably accessible to him, he cannot say that he was misled, simply on the ground that the other assumed to act as agent without authority. Of course, if the agent conceals or misrepresents material facts, to the detriment of the other party, he cannot claim exemption."

Judge Story, in his valuable work on Agency (section 265), says: "This doctrine, however, as to the liability of the agent where he contracts in the name and for the benefit of the principal, without having due authority, is founded upon the supposition that the want of authority is unknown to the other party, or, if known, that the agent undertakes to guaranty a ratification of the act by the principal. But circumstances may arise in which the agent would not or might not be held to be personally liable, if he acted without authority, if that want of authority was known to both parties or unknown to both parties."

Abundant authorities are cited by each author in support of these propositions. The same thought is equally applicable to the third reason above given for the general rule. And it may be further said that the implied warranty of the agent does not relate to the power of the principal to enter into the particular contract. He simply covenants that he has authority to act for his principal, not that the act of the principal is legal and binding. Hence it has been justly said that the contract must be one which the law would enforce against the principal, if it had been authorized by him, else the anomaly would exist of giving a right of action against an assumed agent for an unauthorized representation of his power to make the contract, when a breach of the contract itself, if it had been authorized, would have furnished no ground of action against the principal. Abeles v. Cochran, 22 Kan. 406, 31 Am. Rep. 194; Baltzen v. Nicolay, 53 N. Y. 467; Mechem, Ag. § 548; Snow v. Hix, 54 Vt. 478.

In the case now under consideration the defendant Daggett made no representations as to his authority, save that contained in the letter itself. He is guilty of no actionable deceit, unless it be found in the fact that he signed the letter of guaranty as vice president, and thus represented that he had authority to represent his bank. He had this authority, if any officer of a national bank has it, for no question is made as to his authority to represent the bank in the making of any contract it is authorized to execute. The action is not, then, based upon any misrepresentation as to his authority, but upon the invalidity of the contract itself as between plaintiff and the bank. There was no actionable deceit, for the plaintiff is presumed to know as much about the powers of national banks as the defendant. There is, as we have said,

no implied warranty by an agent that his principal has authority to make the contract. As a rule, that is a question of law, of which each party has equal knowledge. In the case against the bank we held that the national banks have no authority to enter into such contracts, and as the plaintiff has no right of action against the bank upon a contract of guaranty, such as the one in suit, no recovery should be permitted against the agent; for this would hold every agent to a warranty of the legality of his principal's contracts. As we have seen, this is not the obligation of the agent. The second reason sometimes given for the general rule of liability of the agent does not appear to us to be sound. By the application of this principle a new contract is made for the parties. An engagement is created which the parties did not intend to assume, and the decided weight of authority is against such rule. See Hall v. Crandall, 29 Cal. 567, 89 Am. Dec. 64; Ogden v. Raymond, 22 Conn. 379, 58 Am. Dec. 429; Duncan v. Niles, 32 Ill. 532, 83 Am. Dec. 293; Stetson v. Patten, 2 Greenl. 358, 11 Am. Dec. 111; Abbey v. Chase, 6 Cush. 56; White v. Madison, 26 N. Y. 117; McCurdy v. Rogers, 21 Wis. 199, 91 Am. Dec. 468.

We should be slow to adopt any rule which would bind a party who did not by the terms of his contract agree to become responsible. Indeed, the question seems to be put at rest, so far as this court is concerned, in Willett v. Young, 82 Iowa, 292, 47 N. W. 990, 11 L. R. A. 115. The rules herein announced are not in conflict with any of the previous decisions of this court. The case of Winter v. Hite, supra, related to the contract of an executrix, and it is there said that such cases should not be confounded with those of agency. In the case of Andrews v. Tedford, supra, the question was left undecided. Allen v. Pegram was an action against an agent who assumed to act for a principal that had no existence; and so was Lewis v. Tilton, 64 Iowa, 220, 19 N. W. 911, 52 Am. Rep. 436. These cases come clearly within the general rule first announced. In other cases cited by appellant's counsel the agent was held liable because of the form of his signature. They have no application to the question before us.[10]

We do not think that Daggett, the agent, is personally liable, under the facts disclosed in this case, and the judgment is affirmed.

[10] See especially Baltzen v. Nicolay, 53 N. Y. 467 (1873), in which the contract was unenforceable as coming under the statute of frauds; Bloodgood v. Short, 50 Misc. Rep. 286, 98 N. Y. Supp. 775 (1906), in which the agent lacked the necessary written power of attorney to sell land; and Beattie v. Ld. Ebury, L. R. 7 Ch. Cas. 777, 41 L. J. Ch. 804, 27 L. T. Rep. N. S. 398, 20 Wkly. Rep. 94 (1872), affirmed in L. R. 7 H. L. 102, 44 L. J. Ch. 20, 30 L. T. Rep. 581, 22 Wkly. Rep. 897 (1874), distinguishing the leading case of Collen v. Wright, 8 Eq. & B. 647, 4 Jur. N. S. 357, 27 L. J. Q. B. 215, 6 Wkly. Rep. 123, 92 E. C. L. 647 (1857). In the latter case Cockburn, C. J., dissenting, vigorously criticises the invention of a contract of implied warranty of authority. The doctrine is upheld in Anderson v. Adams, 43 Or. 621, 74 Pac. 215 (1903), and especially in the leading case of Farmers' Co-op. Trust Co. v. Floyd, 47 Ohio St. 525, 26 N. E. 110, 12 L. R. A. 346, 21 Am. St. Rep. 846 (1890).

IV. NON-EXISTENT PRINCIPAL

EICHBAUM v. IRONS.

(Supreme Court of Pennsylvania, 1843. 6 Watts & S. 67, 40 Am. Dec. 540.)

Assumpsit for a dinner furnished on the order of the defendants to celebrate the Whig victory at the election of 1840. Defendants Davis and Eichbaum opposed the proposal in the meeting, but a majority voted for it. Verdict directed for plaintiff.

GIBSON, C. J. This case is unique, but really resolvable on principle. It seemed, at first, to resemble the case of a committee sued for the price of meats and wines furnished on its order to a club: but though the defendants acted in obedience to a constituency, it was, unlike a club, which is a permanent body, an intactible and irresponsible one. The plaintiff, being examined without objection, testified that he furnished the dinner on the order of the Whig party, but that it was to the committee he looked for payment. It is probable that neither he nor they spent a thought on the subject; but it is not, therefore, to be concluded that he agreed to give the dinner for nothing; and the responsibilities of the parties concerned are to be determined on the ordinary principles of the law of contracts. The facts are, that the defendants and others, being a committee constituted by a popular meeting to order and manage a dinner, contracted with the plaintiff to furnish it, and directed the secretary of the meeting to report the proceeding to the Tippecanoe Club, an affiliated society, for its approbation.

Now it will not be pretended that nobody was responsible to the plaintiff for the order; and, if the defendants were not, who else was? Were they to be viewed as the agents of a club, we would have something palpable to deal with. The question would be, whether they had become personally liable by having exceeded their authority, or whether they had not contracted on the credit of their constituents. But a club is a definite association, organized for indefinite existence: not an ephemeral meeting, for a particular occasion, to be lost in the crowd at its dissolution. It would be unreasonable to presume that the plaintiff agreed to trust to a responsibility so desperate, or furnish a dinner on the credit of a meeting which had vanished into nothing. It was already defunct; and we are not to imagine that the plaintiff consented to look to a body which had lost its individuality by the dispersion of its members in the general mass. But the question would not depend on the law of partnership, even were such a meeting to be treated as a club; for though Lord Eldon, in Beaumont v. Meredith, 3 Vez. & Beat. 180, and Lord Abinger, in Flemyng v. Hector, 2 Meeson & Welsb. 179, seemed to have thought that a member of a club is a partner, the notion was exploded by Chief Justice Tyndal, in

the last trial of Todd v. Emly, cited in Wordsworth on Joint Stock Companies, 183.

Neither is it determinable on the law of principal and agent; for there was no principal. At first, I thought the credit might have been given to the primary meetings on the authority of those cases in which officers have been held liable to have contracted on the credit of the government; but the certainty of payment, in those instances, was so great as to make the moral responsibility of the government the preferable security. Not so the moral responsibility of a populace, which is infinitely weakened by being infinitely divided. In a case like this, the usual presumption of credit is inverted; and, in the absence of evidence to the contrary, the vendor is supposed to have relied on the responsibility of the persons who gave the order. What we have to do, then, is to determine how far each of the defendants was a party to it.

When several dine together at a tavern, each is liable for the reckoning. Collyer on Partn. 25, note w. But, I take it, they are liable jointly and not severally; for though only one should order, those who approve of it become parties, except where credit is given to one, in exclusion to those who happen to be his guests. This principle is deducible from Delauney v. Strickland, 4 Stark. R. 366. Did the defendants, then, all concur in the order given for the dinner in question? If they did not, the plaintiff cannot recover.

It is not disputed that they were present when the measure was definitely adopted; but it is proved that Davis and Eichbaum opposed it while it was under consideration. What then? They at last submitted to the majority, and made the resolution their own. In Braithwaite v. Skofield, 9 B. & C. 401, a member of a committee who was present at the adoption of a resolution to have certain work done, was held liable to the tradesmen. Every member present assents before hand to whatever the majority may do, and becomes a party to acts done, it may be, directly against his will.[11] If he would escape responsibility for them, he ought to protest, and throw up his membership on the spot; and there was no evidence that any of the defendants did so. On the contrary, they all remained till the meeting was dissolved, and the order given. It is true, that Mr. Davis afterwards desired the plaintiff to give the matter up; but the dinner was in preparation, and it was too late to retract. Of what importance, then is the

[11] Accord: Frendendall v. Taylor, 23 Wis. 538, 99 Am. Dec. 203 (1868), in which a committee of the State Fireman's Association contracted for a well, or tank, for a state tournament; Ash v. Guie, 97 Pa. 493, 39 Am. Rep. 818 (1855), in which members of a masonic lodge were sued on a contract for a masonic temple; Lewis v. Tilton, 64 Iowa, 220, 19 N. W. 911, 52 Am. Rep. 436 (1881), in which a committee of a Good Templars Lodge signed a lease for lodge rooms; Winona Lumber Co. v. Church, 6 S. D. 498, 62 N. W. 107 (1895); Kelner v. Baxter, L. R. 2 C. P. 174, 12 Jur. N. S. 1016, 36 L. J. C. P. 94, 12 L. T. Rep. N. S. 313, 15 W. R. 278 (1866). Cf. Hollman v. Pullin, 1 Cab. & El. 254 (1884).

disputed fact of his having partook of the repast with the rest? Had he done so, his final accession would, according to Delauney v. Strickland, have made him liable despite of other considerations; but he had become irrecoverably liable by the order of the committee, given in his presence, and apparently with his approbation.

The defendants have not pleaded the non-joinder of the other members in abatement; and the evidence showed such a joint liability of those who have been sued, as warranted the direction. Judgment affirmed.

CODDING v. MUNSON.

(Supreme Court of Nebraska, 1897. 52 Neb. 580, 72 N. W. 846, 66 Am. St. Rep. 524.)

IRVINE, C.[12] Munson sued Codding, alleging that he had sold and conveyed to him certain land for the price of $10,000, that $9,750 thereof had been paid, and praying judgment for the remaining $250. The answer was a general denial. The plaintiff recovered, and the defendant brings the case here by petition in error.

The evidence discloses that there were held several open meetings of citizens of York for the purpose of securing the location there of an institution for the care of orphans, under the patronage of the Woman's Home Missionary Society of the Methodist Episcopal Church. It was understood that a gift of about $10,000 would be necessary to accomplish the purpose. Both plaintiff and defendant attended the meetings, and contributed to the undertaking. It was determined that the donations should be in the form of negotiable promissory notes, made to the order of a trustee to be designated for that purpose. A committee appointed at one of the meetings, under power possessed or assumed by it, designated the defendant, Codding, as trustee. It would seem that the institution was formally located at York, but, instead of giving the notes or their proceeds to the society, the land of plaintiff was purchased, and conveyed to "Anson B. Codding, trustee," he in turn conveying to the missionary society. Codding indorsed without recourse a number of subscription notes to Munson, and these notes, together with other items accepted by Munson, made up the sum of $9,750, which Munson admits receiving. It is not contended that the price was other than claimed, or that the remainder was paid. The only question is as to Codding's personal liability therefor. So far as has been stated, the evidence is quite clear and free from conflict. As to the extent of Codding's authority, if he possessed any, and the nature of the transactions between him or other citizens of York on the one side and Munson on the other with reference to the purchase, the evidence is exceedingly vague, and leaves

[12] Part of the opinion is omitted.

much to inference, if not to conjecture. Still it is upon the last question that the case must be made chiefly to turn.

It is the general rule that one who assumes to act as agent for a principal who has no legal status or existence renders himself individually liable on contracts so made. Learn v. Upstill, 52 Neb. 271, 72 N. W. 213. This doctrine receives its most frequent application in cases like the present, where a person or committee incurs obligations as the result of instructions given by a body gathered together informally for a special purpose, and possessing no definite membership or continued power of existence. The rule is founded upon a presumption of fact, and is not the expression of any positive or rigid legal principle. The presumption referred to is that the parties to a contract contemplate the creation of a legal obligation capable of enforcement, and that, therefore, it is understood that the obligation shall rest on the individuals who actively participate in the making of the contract, because of the difficulty in all cases—the impossibility in many—of fixing it upon the persons taking part in or submitting to the action of the evanescent assemblage. If, however, the person with whom the contract is made expressly agrees to look to another source for the performance of its obligations, or if the circumstances be such as to disclose an intention not to charge the agent, as where the other agrees to accept the proceeds of a particular fund, there is no longer reason to indulge the presumption, and it may be rebutted by proof of such facts. This qualification of the general rule is clearly indicated in Learn v. Upstill, and is recognized by nearly all the cases discussing the general subject. See cases cited by Judge Norval in Learn v. Upstill; also Heath v. Goslin, 80 Mo. 310, 50 Am. Rep. 505; Button v. Winslow, 53 Vt. 430; Comfort v. Graham, 87 Iowa, 295, 54 N. W. 242.

Applying these principles to the case at bar, the evidence would raise prima facie the presumption upon which the general rule is based. On the other hand, it was sufficient to justify the inference that the plaintiff did not look to defendant personally, but was to receive merely the subscription notes, or their proceeds. The instructions should have stated the law as we have indicated it, and submitted to the jury the issues bearing thereon. Instead thereof, the court charged as follows: "If you find from the evidence that Codding was in this transaction only agent and trustee for the Mothers' Jewels Home, and that all his transactions as such agent and trustee have been performed in good faith, then you should find for the defendant." This was erroneous, because it made Codding's release from liability depend upon his acting as agent for the home, and his performing his duty in good faith. It was not claimed that he was agent for the home, but for the citizens of York. This principal having no legal status, the instruction should have been that Codding was liable unless the agreement was that Munson was to look solely to the subscriptions.

The error was prejudicial to the defendant, because there was no evidence of an agency such as the instruction submitted,[18] and a verdict for plaintiff was therefore required without regard to that phase of the evidence which, if properly submitted, might have induced a different finding. * * *

Reversed and remanded.

Ex parte HARTOP.

(High Court of Chancery, 1806. 12 Ves. Jr. 349.)

This petition was presented by the messenger under a Commission of Bankrupt, upon the petition of George Sanders; praying, that the Solicitor, who sued out the Commission, or the petitioning creditor, or one of them, may pay to the petitioner the sum of £26. 13s. the balance due upon his bill of fees, and also the sum of £183., paid by him under an award for damages and costs in an action of trespass brought against him: the Bankruptcy not being established; and the Commission being superseded; and the petitioning creditor being absconded. The petitioner had sued the petitioning creditor; and obtained from him payment in part of his bill.

ERSKINE, Lord Chancellor. This petition has two very important objects; 1st, as it regards the justice of this demand: 2dly, as to the jurisdiction to give relief to the parties, if they are in a condition to have it any where. The prayer of the petition is material: not, that the Solicitor only may pay, but, that either he or the petitioning creditor, or one of them, shall pay the residue of the petitioner's bill, as messenger, and a further sum composed of damages and costs, paid by the petitioner under an award in an action brought against him.

No rule of law is better ascertained, or stands upon a stronger foundation, than this; that, where an agent names his principal, the principal is responsible: nor the agent: but, for the application of that rule, the agent must name his principal as the person to be responsible. In the common case of an upholsterer, employed to furnish a house: dealing himself in only one branch of business, he applies to other persons to furnish those articles, in which he does not deal. Those persons know, the house is mine. That is expressly stated to them. But it does not follow, that I, though the person to have the enjoyment of the articles furnished, am responsible. Suppose another case. A person instructs an Attorney to bring an action; who employs his own stationer, generally employed by him. The client has nothing to do with the stationer, if the Attorney be-

[18] The burden of showing that the principal is non-existent, or a sham, is on the party suing the agent. If there is a responsible principal, the agent who has acted for him, of course, is not liable. Fulton v. Sewall, 116 App. Div. 744, 102 N. Y. Supp. 109 (1907).

comes insolvent. The client pays the Attorney. The stationer therefore has no remedy against the client.

This petitioner insists, that the Solicitor must be taken to be the person employing him; to whom he is to look; not the petitioning creditor. The Solicitor, undertaking to sue out the Commission, goes to his own Messenger; who, being employed by the Solicitor, has no remedy against the petitioning creditor. But this petitioner appears to me to have decided this for himself; having sued Sanders, the petitioning creditor; and having obtained a note from him; which was paid. What colour was there for proceeding against him, the Solicitor being the original undertaker; and no pretence of a joint undertaking? That objection, that the Solicitor employed the Messenger, the petitioning creditor not going near him, but being a total stranger, the messenger therefore being to look to the Solicitor only, does not lie here: this petitioner having considered the petitioning creditor as his debtor; which could not be, if the Messenger had been employed by the Solicitor. It is not necessary therefore to decide the general question.

As to the jurisdiction, I should regret to find, I have no jurisdiction. The party suing out a Commission under the authority of the Great Seal, employing the Messenger, either himself, or by his Solicitor, to give it effect, giving a bond to the Great Seal, and responsible to the Great Seal for the due prosecution of the Commission, I have no doubt of the jurisdiction. The Solicitor, if responsible in any degree, will be responsible, not only for the fees, but also for all the consequences; as it was his duty to direct the Messenger to withdraw; for I will not put the Messenger in a situation of such responsibility. The Solicitor must also account, if he has any money of Sanders's in his hands. Let him make an affidavit as to that.

V. Principal Undisclosed

MURPHY v. HELMRICH.

(Supreme Court of California, 1884. 66 Cal. 69, 4 Pac. 958.)

Action to recover the difference between the contract and market price of one hundred shares of gas stock which plaintiff claims to have sold to defendants.

McKee, J.[14] * * * The defendants, by their answer to the complaint in the action, specifically denied the averments of the complaint, and set up that they acted in the transaction "solely as brokers and agents for others," and the only questions at issue were: (1) Did the defendants buy the stock as charged in the complaint? (2) Did they buy for themselves or as agents for another?

[14] Part of the opinion is omitted.

The evidence shows that there was a complete verbal contract of sale, which was followed by written admissions of the contract, signed by the defendants. These they signed by their own names, and not as agents for any other person whom they named as principal. In thus signing them they bound themselves as principals, even if they were acting for another, unless it was so understood and intended between them and their vendor. But their memoranda did not disclose the name of any principal, and there was no evidence given tending to prove that there was any other known person for whom they acted and intended to bind. Where an agent does not attempt in an instrument to bind his principal, and in terms imposes the obligation on himself, the rule is that he incurs by such act a personal liability, even although he described himself as agent. Dayton v. Warne, 43 N. J. Law, 659. This personal liability they assumed; for, while vaguely intimating that there was somebody for whom they were acting, they guarantied the plaintiff, as their vendor, that he would be paid the $95.50 per share for the stock which they agreed to buy from him, and afterwards directed him to sell it and they would make good any deficiency. He accordingly sold the stock in open market and accounted to them. Under those circumstances they are not relievable from responsibility on the ground of agency for some unknown person.

"If a person," says Chancellor Kent, "would excuse himself from responsibility on the ground of agency, he must show that he disclosed his principal at the time of making the contract, and that he acted on his behalf so as to enable the party with whom he deals to have recourse to the principal in case the agent had authority to bind him." "The agent becomes personally liable when the principal is not known, or when there is no responsible principal, or where the agent becomes liable by an undertaking in his own name, or when he exceeds his power." 2 Kent, Comm. 630, 631.[15]

And such is the English law: "A man has a right to the character, credit, and substance of the person with whom he contracts. If, therefore, he enters into a contract with an agent who does not give his principal's name, the presumption is that he is invited to give credit to the agent; still more if the agent does not disclose his principal's existence." Anson, Cont. 345. See, also, Benj. Sales, 235, 52, 53.

We find no error in the record. Judgment and order affirmed

[15] The agent may so contract as to make both himself and his principal liable by adding his personal responsibility to that of the principal. Dockarty v. Tillotson, 64 Neb. 432, 89 N. W. 1050 (1902). In general, in such cases, the third person may pursue either, or both, until he recovers the contract price. Knapp v. Simon, 96 N. Y. 284 (1884). As to election, and what constitutes, see post, p. 738 ff.; also, Am. Alkali Co. v. Kurtz (C. C.) 134 Fed. 663 (1905). There can be but one recovery. Roumsaville v. Insurance Co., 138 N. C. 191, 50 S. E. 619 (1905).

COCHRAN v. RICE.

(Supreme Court of South Dakota, 1910. 26 S. D. 393, 128 N. W. 583, Ann. Cas. 1913B, 570.)

Plaintiff owned certain hay, and a granary containing wheat, all of the value of $912. Defendant was managing agent of the Western Land & Investment Company, which owned 40 acres adjoining the granary. Rice employed one Stevens to plow this field. Stevens sent his two boys to do the plowing, and they set fire to stubble in the field. The fire spread and burned plaintiff's hay and granary. Plaintiff recovered judgment and defendant appeals.

SMITH J.[16] [After holding that Stevens was not an independent contractor:] * * * Appellant's contention that he cannot be held liable because he acted only as agent of the corporation cannot be sustained. His own evidence affirmatively shows that his agency was not disclosed to Stevens, nor is it shown that Stevens had any knowledge of the facts. Having assumed to act as principal, no reason is apparent why he should not be held to have assumed the responsibilities of a principal toward third persons for the act of a servant or employé. In 31 Cyc. 1555, the rule is very clearly and concisely stated: "An agent who enters into a contract in his own name without disclosing the identity of his principal renders himself personally liable, even though the third person knows that he is acting as agent, unless it affirmatively appears that it was the mutual intention of the parties to the contract that the agent should not be bound. With stronger reason, an agent who, without disclosing his agency, enters into contractual relations in his own name with one who is unaware of the agency, binds himself and becomes subject to all liabilities, express and implied, created by the contract and transaction, in like manner as if he were the real principal, although in contracting he may have intended to act solely for his principal. If the agent would avoid personal liability on a contract entered into by him in behalf of his principal, he must disclose not only the fact that he is acting in a representative capacity, but also the identity of his principal, although, if the other party has actual knowledge of the principal's identity, it would have the same effect to relieve the agent as a disclosure by the latter.

The disclosure of the principal's identity need not be made at the inception of the transaction; it is sufficient if it is made before liability is incurred on either side; but a disclosure made after liability is incurred comes too late to relieve the agent from liability." 31 Cyc. 1560, says: "While an agent is not liable to third persons for injury resulting from his omission to perform a duty owed to the principal alone, he is liable to them for injury resulting from his

[16] Part of the opinion is omitted.

misfeasance or malfeasance, meaning by those terms the breach of duty owed to third persons generally, independent of the particular duties imposed by his agency. Accordingly, an agent may be held liable in damages to third persons for conversion, fraud, and deceit, and even for negligence. In an action against an agent for misfeasance or malfeasance, it is no defense that he acted as agent or by the authority or direction of another, for no one can lawfully authorize the commission of a tort."

Appellant also contends that the evidence fails to show that the act of Stevens in starting the fire was done as a necessary part of the services rendered under his employment. This question was fully and fairly submitted to the jury under instructions decidedly favorable to the defendant, upon evidence disclosing all the surrounding conditions, and their verdict cannot be disturbed upon appeal.

A full and careful consideration of the entire record before us discloses no reversible error.

The order and judgment of the trial court are affirmed.

WINSOR v. GRIGGS.[17]

(Supreme Judicial Court of Massachusetts, 1849. 5 Cush. 210.)

WILDE, J. This is an action of assumpsit upon an award, and the first question to be decided is, whether the defendant is bound by the submission to arbitration, he having signed the same as agent, but without disclosing the name of his principal. And on this question the rule of law is well laid down by Judge Story in his Commentaries on the Law of Agency, §§ 266, 267. "A person," he says, "contracting as agent, will be personally responsible, where, at the time of making the contract, he does not disclose the fact of his agency. And the same principle will apply to contracts made by agents, where they are known to be agents, and acting in that character, but the name of their principal is not disclosed; for until such disclosure, it is impossible to suppose, that the other contracting party is willing to enter into a contract, exonerating the agent, and trusting to an unknown principal, who may be insolvent, or incapable of binding himself."

This is a very reasonable rule of law, and it is supported by the authorities. 2 Kent, 630, 631, and the cases there cited. "If a person" says chancellor Kent, "would excuse himself from responsibility on the ground of agency, he must show that he disclosed his principal at the time of making the contract." The same principle is laid down as a rule of law well settled, by lord Tenterden, in the

[17] Accord: Horan v. Hughes (D. C.) 129 Fed. 248 (1903), affirmed 129 Fed. 1005, 64 C. C. A. 581 (1904).

case of Thompson v. Davenport, 9 B. & C. 78, and by Parker, C. J., in Stackpole v. Arnold, 11 Mass. 27, 6 Am. Dec. 150. It is clear, therefore, that the defendant is personally bound by the submission, which he signed as agent, as he did not disclose the name of his principal, and it does not appear that the same was known to the plaintiffs. * * *

Judgment of the court of common pleas affirmed.

NICHOLS v. WEIL.

(Supreme Court of New York, Appellate Term, 1900. 30 Misc. Rep. 441, 62 N. Y. Supp. 477.)

MACLEAN, J. Upon evidence ample therefor the learned justice below determined that the plaintiff had rendered work, labor, and services and furnished material upon certain premises under an agreement with the defendant, who testified that he had informed the plaintiff that he was not the owner, but the attorney for the owner, of the premises. Inasmuch as the defendant did not disclose the name of his principal, his contention against personal liability was ineffectual. Argersinger v. MacNaughton, 114 N. Y. 535, 21 N. E. 1022, 11 Am. St. Rep. 687; Nelson v. Andrews, 19 Misc. Rep. 623, 44 N. Y. Supp. 384.[18]

Judgment affirmed, with costs. All concur.

HOLT v. ROSS.[19]

(Commission of Appeals of the State of New York, 1873. 54 N. Y. 472, 13 Am. Rep. 615, affirming 59 Barb. 554.)

Action to recover back the amount paid by plaintiff to the Merchants' Union Express Company of which Ross was president, upon a draft upon a forged indorsement by the payee. The draft was drawn upon Holt by a creditor and was payable to one T. D. Ford. It

[18] Neely v. State, 60 Ark. 66, 28 S. W. 800, 27 L. R. A. 503, 46 Am. St. Rep. 148 (1894), in which a minor bought whisky "for two sick teachers." The court held this a sale to the minor, and therefore illegal.

[19] Approved in McClure v. Cent. Trust Co., 165 N. Y. 108, 58 N. E. 777, 53 L. R. A. 153 (1900), but cf. Alexander & Edgar Lumber Co. v. McGeehan, 124 Wis. 325, 102 N. W. 571 (1905), in which the court pointed out that one dealing with the agent of a known principal, in the regular course of conducting the principal's business by such agent, is presumptively, in the absence of any evidence contra, dealing as agent on the credit of the principal. Forrest v. McCarthy, 30 Misc. Rep. 125, 61 N. Y. Supp. 853 (1899), in which the plaintiff's testimony clearly showed she consciously dealt with defendant as the representative of his principal, and that she had had previous dealings of the same sort. The question is not whether one is agent, is acting as such, or is known to be such, but whether in the given transaction it was understood by

fell into the hands of a stranger, who forged the indorsement of T. D. Ford, and the draft so indorsed was cashed by the Express Company. Plaintiff, supposing the indorsement genuine, paid the Express Company, and afterwards was compelled to pay a second time to the creditor. The Express Company claimed to have acted merely as agent in the collection.

EARL, Com. The Express Company, when it presented the draft to the plaintiffs for payment and received payment, did not disclose its agency; therefore it is liable, as if actually principal in the transaction. It was so decided in Canal Bank v. Bank of Albany, 1 Hill, 287. It was not sufficient that the defendant acted as agent; to shield itself from liability it should have disclosed its agency. Such is the rule as to all agents. To shield themselves from liability for their acts they must give the names of their principals. Such is the rule in reference to the transfer of negotiable paper. If the transferrer be only an agent, if he did not at the time disclose the name of his principal, and the bill or note proves to be a forgery, he is personally liable for the consideration received. Gurney v. Wormsley, 4 Ell. & B. 133; Morrison v. Currie, 4 Duer, 79; 2 Pars. Notes, 38.

It matters not that the general business of the express company was to act as agent for others. It could have owned this draft and have collected it as principal. Knowledge in plaintiffs that defendant might have acted as agent was not enough; and it was not the duty of the plaintiffs to inquire, before paying, whether the defendant was acting as principal or agent. It was the duty of defendant, if it desired to be protected as agent, to have given notice of its agency. The drawees of a draft are supposed to know the signature of the drawer, but are not supposed to have the same knowledge of the signature of an indorser. By acceptance and payment the drawees do not admit or guarantee the genuineness of the indorsement by the payee. Canal Bank v. Bank of Albany, supra; 1 Pars. Notes, 322; Id. 590.

This is therefore a clear case for affirmance.[20]

the parties that the third person dealt on the credit of the agent, or on that of the principal. Worthington v. Cowles, 112 Mass. 30 (1873).

The fact that one is a factor or broker would not relieve him from the necessity of disclosing his principal, if he would escape personal liability. Hamlin v. Abell, 120 Mo. 188, 25 S. W. 516 (1894); Argersinger v. MacNaughton, 114 N. Y. 535, 21 N. E. 1022, 11 Am. St. Rep. 687 (1889). And the same thing is true of an auctioneer. Meyer v. Redmond, 141 App. Div. 123, 125 N. Y. Supp. 1052 (1910); Mills v. Hunt, 20 Wend. 431 (1838). Cf. next case over.

[20] The dissenting opinion of Reynolds, C., is omitted.

MERCER v. LEIHY.

(Supreme Court of Michigan, 1905. 139 Mich. 447, 102 N. W. 972.)

Assumpsit by Mercer against Leihy.

HOOKER, J.[21] Coombs stole some horses, and brought them to defendants' auction rooms, where they were sold at auction to the plaintiff, who afterward sued the auctioneers to recover the money paid, and a judgment of no cause of action was rendered by the circuit judge before whom the case was tried without a jury. Plaintiff appealed, and alleges error upon the finding of fact that the auctioneer sufficiently disclosed his principal to relieve the defendants, his employers, from liability. * * *

The rule is well established that an auctioneer who does not disclose his principal is presumed to contract upon his own behalf, except where he expressly contracts upon the understanding that he will not do so. On the other hand, if he discloses the fact of agency and his principal, the law presumes that he does not contract upon his own behalf, but for the principal. The question here seems to be whether anything less than a disclosure of the name of the principal is sufficient, and a number of authorities are cited which use language to the effect that a disclosure of the name of the principal is essential. Many of these are cases where there is nothing to indicate that there was an agency; others that the principal was not present, and no clue to his identity could be found in the facts stated; while there are others which show that there was an absent principal, yet the language used makes such indefinite reference to him as not to afford an opportunity to immediately ascertain who he is.

Such is the case of Neely v. State, an Arkansas case reported in 60 Ark. 66, 28 S. W. 800, 27 L. R. A. 503, 46 Am. St. Rep. 148, where a minor bought intoxicating liquor, which he said was for two teachers at a neighboring college, without naming or otherwise identifying them. Raymond v. Proprietors of Crown & Eagle Mills, 2 Metc. (Mass.) 319, is another case where the court held that it was not error to submit the question of the sufficiency of the disclosure to the jury, where an agent stated that goods which he was buying were for the C. & E. Mills, the language being ambiguous. So in Cobb v. Knapp, 71 N. Y. 350, 27 Am. Rep. 51, the statement that the property was for the Blissville Distillery was held not conclusive. In each of these cases except the first there is an implication that the facts shown might be found sufficient, otherwise they should not have gone to the jury. They were not so strong in favor of the agent as the case before us, because the opportunity to ascertain was not immediately present; and in the case last mentioned there was testimony not only that the plaintiff did not know who were the pro-

[21] Part of the opinion is omitted.

prietors of the distillery, but that the defendant directed the property to be charged to him.

In Hanson v. Roberdean, Peake, N. P. 163, it is indicated, as it is in many later authorities, that, where the auctioneer fully discloses the fact of his agency and his principal, the presumption arises that he is not contracting upon his own behalf, and that the law recognizes the transaction as one on behalf of the principal. In 2 Kent, Com. 630, 631, it is said: "If a person would excuse himself from responsibility on the ground of agency, he must show that he disclosed his principal (not the name of his principal) at the time of making the contract, and that he acted on his behalf." Other authorities quoted from text-writers and other sources are found in Neely v. State, 60 Ark. 66, 28 S. W. 800, 27 L. R. A. 504, 46 Am. St. Rep. 148. See, also, Reinhardt on Agency, § 303.

We are of the opinion that the statement, frequently found, that the agent, to avoid personal liability, must disclose the name of his principal, is due to the fact that such is, in the nature of things, the natural and ordinary, and many times the only convenient and practicable, way of identifying him. The important information to be given to the purchaser is that the auctioneer is an agent, acting for a principal whom he discloses, and it would seem that the accurate giving of his principal's name is not indispensable where other means of clearly pointing out and identifying him are adopted.

The testimony in this case indisputably shows that the principal was present, and in the presence of the plaintiff identified himself to a degree sufficient to carry that question to a jury, or to the court, where, as in this case, a jury has been waived. It is equally certain that the auctioneer disclosed the fact of agency, and it is inferable that he designed to and did inform those present that he was not selling the property as his own, but for and on behalf of a man who came from Ypsilanti, was present, and upon whom he called to appear and make himself known.[22] We are of the opinion that the court did not err in treating the question as one of fact, subject to decision by him. Of course, we cannot review his finding upon the merits.

The judgment is affirmed.

[22] When the third party knows perfectly well of the agency it is not necessary for the agent to disclose it. Warren v. Dickson, 27 Ill. 115 (1862). "The agent need not say in so many words, 'I am acting merely as agent for A., who is my principal.'" Brown v. Ames, 59 Minn. 476, 61 N. W. 448 (1894).

It is not enough however that the third party has the means of ascertaining the principal, and knows that the agent is acting as agent. The principal must in some way be disclosed. De Remer v. Brown, 165 N. Y. 410, 59 N. E. 129 (1901); McClure v. Cent. Trust Co., 165 N. Y. 108, 58 N. E. 777, 53 L. R. A. 153 (1900); Cobb v. Knapp, 71 N. Y. 348, 27 Am. Rep. 51 (1877).

VI. For Money Paid by Mistake, Fraud, etc.

CARY v. WEBSTER.

(Court of King's Bench, 1721. 1 Strange, 480.)

Pratt, C. J. Where money is paid to the servant and he misapplies it, the party has his remedy against the master or servant at election.

The defendant was a clerk of the South-Sea Company, and took in the payments on the third subscription; the plaintiff paid him £600., and he by mistake never entered it in the book, but however paid it over to the company. And the Chief Justice ruled, that no action would lie against him. That if he had not paid it over the plaintiff would have had his option, either to charge him or the company; as in the common case of payment to a goldsmith's servant, who does not carry it to the account of his master, the party has an election to go against either: he may charge the servant, because till the money is paid over the servant receives it to his use; or he may pass by the servant and make his demand upon the master, because the payment to the servant is made in confidence of the credit given him by the master.

SHEPARD v. SHERIN.

(Supreme Court of Minnesota, 1890. 43 Minn. 382, 45 N. W. 718.)

Action to recover money paid by mistake. There was judgment for plaintiff, and defendant appeals.

Gilfillan, C. J. On the evidence, there could be no question of the main facts in the case, especially that the overpayment was merely through mistake of fact, and not through any fraud or fault on the part of defendant; that he received it expressly for his principal, R. W. Sherin, and had paid the money over to him the same day. These facts were found by the court below; and on the motion for a new trial the court, as appears from its memorandum filed, had no doubt of the propriety of those findings. But the court also found as a fact that the defendant so paid over the money without notice of any mistake; and, because it thought this finding was not justified by the evidence, it ordered a new trial. The evidence as to notice would not have justified any finding of notice to defendant that would have changed the proper result of the action. The law regulating the liability of an agent to the party paying it for money paid to him for his principal through mistake is well settled. We find it as well stated as anywhere in Elliott v. Swartwout, 10 Pet. 137, 9 L. Ed. 373: "When the money is paid voluntarily, and by mistake, to an agent, and he has paid it over to his principal, he cannot be made personally

responsible; but if, before paying it over, he is apprised of the mistake, and required not to pay it over, he is personally liable." See, also, Buller v. Harrison, 1 Cowp. 566; Hearsey v. Pruyn, 7 Johns. 179; La Farge v. Kneeland, 7 Cow. 456; Mowatt v. McLelan, 1 Wend. 173.

The notice of the mistake, and requirement not to pay to the principal, need not be formal. The rule that, if he pays over without notice, he is not liable, is for the agent's protection; and, to deprive him of the protection, the notice to him should be sufficient to apprise him what the mistake is, and that by reason of it the party paying it to him intends to reclaim it.

The only notice of which there was any evidence came about in this way: The principal held the note and mortgage of one Burrows. The latter had arranged for a loan from plaintiff, and, as a part of the money to be loaned, the latter was to pay off the note and mortgage. The principal had authorized defendant to receive a specified sum as due on the note and mortgage, and on receiving it to deliver a satisfaction piece executed by the principal. The sum specified was paid to him, and he delivered the satisfaction. The mistake claimed was in the amount due. Burrows testified that after the payment "I went out and saw Sherin. I told him I thought they had made a mistake. They had figured the note too much. He said he had got to go to the train, and said, if there was anything wrong, my son [the principal] would make it right." This was all the evidence of notice. Had such notice been given by the plaintiff, it would have been hardly sufficient; for it would not have apprised defendant that he intended to reclaim whatever might have been overpaid. But it was by one who had no authority in the matter. According to the arrangement between plaintiff and Burrows, the former could charge the latter with only what was actually due on the note and mortgage, and paid by him. In what was overpaid, plaintiff, and not Burrows, was solely interested. As relates to notice that could affect the rights of the parties, the finding of the court that there was none was the only finding that, on the evidence, could be made.

The respondent points out various rulings on the trial which he claims to be erroneous, and sufficient to justify an order granting a new trial. They have no bearing on the matter of notice, the point as to which plaintiff's case failed, and therefore they could not prejudice him. Order reversed.[28]

[28] The concurring opinion of Dickinson, J., is omitted.

In cases like the above third persons must seek their remedy against the principal, Granger v. Hathaway, 17 Mich. 500 (1869), except when the agent has not changed his original position. In that case he may be sued to recover back the money paid him by mistake. Pancoast v. Dinsmore, 105 Me. 471, 75 Atl. 43, 134 Am. St. Rep. 582 (1909).

BULLER v. HARRISON.[24]

(Court of King's Bench, 1777, 2 Cowp. 565.)

Upon shewing cause why a new trial should not be granted in this case, Lord Mansfield read his report as follows:

This was an action for money had and received, brought by the plaintiff against the defendant, to recover back a sum of £2,100. paid him as due upon a policy of insurance, as *agent* for the insured, Messrs. Ludlow and Shaw, resident at New York. This sum the plaintiff had paid, thinking the loss was fair. Notice of the loss was given by the defendant to the plaintiff on the 20th of April. Part of the money was paid at that time, and the remainder on the 6th of May following; on which day the defendant passed the whole sum in his account with Messrs. Ludlow and Shaw, and gave credit to them for it against a sum of £3,000. in which they stood indebted to him. On the 17th of May, notice was given by the plaintiff to the defendant that it was a foul loss. At this time, nothing had happened to alter the situation of the defendant, or to make it different from what it was on the 20th of April. He had accepted no fresh bills, advanced no sum of money, nor given any new credit to his principals; but affairs between them and him remained precisely in the same situation as on the 20th of April. The question at the trial was, whether this action could be maintained against the defendant, as *agent* of the insured; which depended on this; whether the defendant's having placed this money to the account of his principals, in the manner before stated, was equivalent to a payment of it over.

In general the principle of law is clear; that if money be mispaid to an agent expressly for the use of his principal, and the agent has paid it over, he is not liable in an action by the person who mispaid it: because it is just, that one man should not be a loser by the mistake of another; and the person who made the mistake is not without redress, but has his remedy over against the principal. On the other hand it is just, that as the agent ought not to lose, he should not be a gainer by the mistake. And therefore, if after the payment so made to him, and before he has paid the money over to his principal, the person corrects the mistake; the agent cannot afterwards pay it over to his principal without making himself liable to the real owner for the amount. But the present case turns upon this; that the agent was precisely in the same situation at the time the mistake was discovered, as before. At the trial I inclined to think the plaintiff ought to recover; but did not direct the jury; and they found for

[24] Accord: Smith v. Binder, 75 Ill. 492 (1874). Contra: Cabot v. Shaw, 148 Mass. 459, 20 N. E. 99 (1889). There is no presumption that the agent has paid the money over to the principal. He must prove it. Law v. Nunn, 3 Ga. 90 (1847). He must show that he actually parted with the money, or something equivalent thereto. U. S. Nat. Bank v. Nat. Park Bank, 59 Hun, 495, 13 N. Y. Supp. 411 (1891), affirmed 129 N. Y. 647, 29 N. E. 1028 (1891).

the defendant. I am satisfied I mistook in leaving it open to the jury: For it is clearly a question of law, not a matter of fact: And in conscience the defendant is not entitled to retain the money. Therefore I should have left it to the jury in this manner; if you are satisfied that the money was paid by mistake, and the defendant's situation not altered by any new circumstance since, but that every thing remained in the same state as it was on the 20th of April, you ought to find for the plaintiff.

Mr. Bearcroft and Mr. Davenport, who shewed cause, insisted that the defendant had a right to retain the money in question.

Mr. Wallace and Mr. Dunning were in support of the rule; but Lord Mansfield, thought the case so clear, that his lordship stopped Mr. Dunning, as being unnecessary to give himself any trouble.

Lord MANSFIELD. I am very glad this motion has been made: for I desire nothing so much as that all questions of mercantile law should be fully settled and ascertained; and it is of much more consequence that they should be so, than which way the decision is. The jury were embarrassed on the question whether this was a *payment over*. To many purposes, it would be. It is now argued, that this is not a *mere placing to account*, but a *making rest*. If it were, it would not vary the case a straw. I verily believe the jury were entangled in considering it as a payment over. There is no imputation upon a man who trusts to a misrepresentation of the insured. It is greatly to his honour; but it makes it of consequence to him to know, how far his remedy goes if he is imposed upon. The whole question at the trial was, whether the defendant, who was an agent, had paid the money over. Now, the law is clear, that if an agent pay over money which has been paid to him by mistake, he does no wrong; and the plaintiff must call on the principal; And in the case of Muilman versus ———, where it appeared that the money was paid over, the plaintiff was nonsuited. But, on the other hand, shall a man, though innocent, gain by a mistake, or be in a better situation than if the mistake had not happened? Certainly not. In this case, there was no new credit, no acceptance of new bills, no fresh goods bought or money advanced. In short, no alteration in the situation which the defendant and his principals stood in towards each other on the 20th of April. What then is the case? The defendant has trusted Ludlow and Co. and given them credit. He trafficks to the country where they live, and has agents there who know how to get the money back. The plaintiff is a stranger to them and never heard of their names. Is it conscientious then, that the defendant should keep money which he has got by their misrepresentation, and should say, though there is no alteration in my account with my principal, this is a hit, I have got the money and I will keep it? If there had been any new credit given, it would have been proper to have left it to the jury to say, whether any prejudice had happened to the defendant by means of this payment: But here no prejudice at all is proved, and none

is to be inferred. Under these circumstances I think (and Mr. Justice ASTON with whom I have talked the matter over is of the same opinion) that the defendant has no defence in point of law, and in point of equity and conscience he ought not to retain the money in question.

Mr. Justice WILLES and Mr. Justice ASHHURST were of the same opinion.

PER CURIAM. Rule for a new trial absolute.

MOWATT v. McLELAN.[25]

(Supreme Court of Judicature of New York, 1828. 1 Wend. 173.)

SAVAGE, C. J. This was an action to recover back money paid by mistake. The defendant, as attorney for Mrs. Charity Wright, brought three actions of dower. The defendant in those actions vouched to warranty the ancestor of the Mowatts, the plaintiffs. The suits were compromised by the payment of $1,000 to the defendant, as the attorney of Mrs. Wright; on the receipt of which, Mrs. Wright executed a release of her dower, and her children released their interest, and the suits were withdrawn. The defendant paid over to his client's orders $800, and retained $200 for his costs and counsel fees, which is found to be a moderate compensation. Upon making this payment and settlement, the defendant took a receipt in full. Soon after the compromise, a conveyance was found from Wright and wife to Col. Burr, executed about thirty years previous. The money was paid by the plaintiffs the 24th November, 1821, and this suit brought in 1827, to recover from the defendant the $200 retained by him for his fees.

These facts are found by a special verdict in the court of common pleas for the city of New York, on which that court gave judgment for the defendant.

Two questions arise in this case: 1. Whether Mrs. Wright is liable to refund the sum of $1000 thus received by her? and if so, 2. Is the defendant liable to refund the $200 retained by him for his costs? As the first question is one upon which Mrs. Wright has not been heard, and as that question, we are informed by counsel, will be discussed in a suit now pending against Mrs. Wright, I shall consider first the latter question, assuming for the present argument the liability of Mrs. Wright. In Buller v. Harrison, 1 Cowper, 566, Lord Mansfield says: [For Lord Mansfield's statement of the law, see ante, p. 681.]

[25] Accord: Holland v. Russell, 1 Best & S. 424, 101 E. C. L. 424 (1861). Payment to the principal relieves the agent of liability to the third person even though afterward the principal returns the money to the agent in settlement for his services. Bogart v. Crosby, 80 Cal. 195, 22 Pac. 84 (1889).

The case of Edwards v. Hodding, 5 Taunt. 815, was an action against the defendant as agent and auctioneer for the deposit made by the plaintiff, as purchaser of a freehold estate at auction. The defendant had paid over the deposit after notice that the purchaser was dissatisfied with the title, and therefore the payment over did not protect him. In the case of Cox v. Prentice, 3 Maule & Sel. 345, the defendant, as agent of his correspondent at Gibraltar, had sold the plaintiffs a bar of silver, for which they paid more than the value, from the mistake of the assay-master. Upon discovering the mistake, the plaintiffs applied to the defendant for a return of the money, offering to return the silver. The defendant refused, on the ground that he had forwarded his account to his correspondent, in which he had credited him with the full sum; it appeared, however, that the account was still unsettled between them. Lord Ellenborough states the principle of the agent's liability where there is no change of circumstances, and says, here it is admitted that no money has been paid over by the defendant to his principal, nor has there been any other thing done by him to create a change of circumstances. He then argues the case upon the liability of the principal. Bayley, justice, speaking of the case of Buller v. Harrison, says, "That case decides, that if things remain in the same state as they did here, the action will lie against the agent." The same point has been so decided in this court. Hearsey v. Pruyn, 7 Johns. 182, and 7 Cowen, 460, La Farge v. Kneeland. In the latter case, Kneeland had received money for Braham and Atwood, which the plaintiff was entitled to recover from them; but the defendant had passed it to the credit of his principals, and that credit was passed to the credit of another account. This we considered equivalent to a payment. It closed the account between the agent and his principals, and therefore we held the agent was discharged. In this respect, that case differed from the cases of Buller v. Harrison and Cox v. Prentice. In both these cases the account remained open; no change of circumstances had taken place; an erroneous credit had been given, which might be balanced by a corresponding charge on the debit side of the account; no settlement had taken place, nor any closing of the accounts between the parties.

In the case now under consideration, the money was honestly and fairly received by the defendant as agent for his client, who, we now assume, ought to pay it back. The defendant disposed of the whole of it according to the directions of his client, paid her $500, paid $300 to one Elias Baldwin, retained $200 to himself, and finally settled his accounts and concerns with his principal, by taking a receipt in full. The $200 never passed out of his hands; and it seems to be conceded, that if he had paid the whole sum to Mrs. Wright, and she had paid him back $200 in other money, this action could not be sustained. And is it possible that the rights of parties in this court depend upon idle and unmeaning ceremonies? If the transaction was what it purports, it was in reality a payment by the defendant to his

client, of the money in his hands, which he had received as her agent, and payment by her to her attorney of his costs. This closed the account between them. It is not to be corrected by a charge in an open account. There is no foreign correspondent either in America or at Gibraltar, as in the cases above cited, of Buller v. Harrison and Cox v. Prentice. If the plaintiffs recover here, the defendant must resort to his action to recover his money. This the plaintiffs can also do, and indeed have done. And here, too, it is alleged, if the defendant should be driven to his action against his client, his remedy is gone by lapse of time. The plaintiffs do not sue till the statute of limitations is closing upon them; and already more than six years have elapsed since the settlement between the defendant and his client.

I am of opinion that the defendant is not liable, and that the judgment of the court below be affirmed.

BURROUGH v. SKINNER.[26]

(Court of King's Bench, 1770. 5 Burrow, 2639.)

The defendant was an auctioneer; and, in that character, had sold to the plaintiff an interest in land, for which the plaintiff had paid him a deposit of £50. but, upon an objection to the title, and the want of disclosure of certain circumstances which ought to have been disclosed at the time of the bidding, the plaintiff (the purchaser) declined going on with the contract: and, in the opinion of the court, she had sufficient reason for so doing. She therefore required the auctioneer to pay her back his deposit of £50. The auctioneer refused. Whereupon, the bidder brought this action against him, to recover it. The auctioneer paid £8. into court. The cause was tried: and the plaintiff obtained a verdict. The auctioneer moved for a new trial; and had a rule to shew cause.

But, upon shewing cause,

The COURT were clear, that the action lay against the auctioneer. The money does not appear to have been paid over by him to his principal. But if it had been so, yet the objection appears to have been made before it either was or ought to have been so paid over. He was a stake-holder, a mere depositary of the £50. and ought not to have parted with it, till such time as the sale should be finished and completed, and it should appear in the event to whom it properly belonged.

They also thought that the auctioneer had acknowledged himself to be liable to the action, by paying money into court.

They therefore unanimously discharged the rule for shewing cause why there should not be a new trial.

[26] Approved in Read v. Riddle, 48 N. J. Law, 359, 7 Atl. 487 (1886); Martin v. Allen, 125 Mo. App. 636, 103 S. W. 138 (1907).

SADLER v. EVANS, or LADY WINDSOR'S CASE.[27]

(Court of King's Bench, 1766. 4 Burrow, 1984.)

A motion having been made, on behalf of the plaintiff, to set aside a non-suit—

On the last day of Easter Term last (1766), Mr. Justice Aston reported from Mr. Baron Perrot who tried the cause, That this was an action for money had and received to the plaintiff's use; and that the counsel for the plaintiff, who opened the cause at the trial, stated the action to be brought with *intention to try the right* of Lady Windsor to a quitrent of one shilling, and to another sum of six-pence for mises. They stated, that the defendant was her *receiver;* and demanded them of the plaintiff, *as such.* That the plaintiff paid the 1s. 6d. to the defendant; and took a receipt for them, by which, the defendant acknowledged to have received them for the use of Lady Windsor. That, in fact, these sums were *not due* to Lady Windsor; and that they were therefore received without any good consideration; and consequently, that *this action* well lay against the defendant into whose hands they were paid. And they were prepared with, and would have called evidence to the right.

But the judge (Mr. Baron Perrot) was of opinion, that under these circumstances, the *action did not lie* against the defendant. That nothing could be more absurd than to make the *collector or receiver* of another person liable to an action for every payment that was *voluntarily* made to him; and to leave him to be defended, or deserted, by his principal, as such principal should think fit. That it was (in his opinion) yet still more absurd, as he did not see how a verdict given in this cause could ever be received in evidence for or against the right which might in a future cause come to be tried. That if this action lay in such a case as this, it would lie against every attorney who, by his client's direction, should demand and receive money as due to his client, which the supposed debtor might *voluntarily* pay, and afterwards think fit to dispute. He thought that if the one shilling and six-pence had been paid over to Lady Windsor, the plaintiff might

[27] Approved by Lord Kenyon, C. J., in Greenway v. Hurd, 4 T. R. 553 (1792). In such cases the moment the money is in the agent's hands it is virtually in the principal's hands. Coleridge, J., in Bamford v. Shuttleworth, 11 Ad. & El. 926, 39 E. C. L. 488 (1840). There is no privity between the agent and the third person, nor any fiduciary relation. Ellis v. Goulton, [1893] 1 Q. B. 350. The right of the principal cannot be tried in an action against the agent. Shipherd v. Underwood, 55 Ill. 475 (1870). The cause of action, if any, is against the principal. Bailey v. Cornell, 66 Mich. 107, 33 N. W. 50 (1887). The contract is that of the principal, and not of the agent. Huffman v. Newnan, 55 Neb. 713, 76 N. W. 409 (1898).

See especially the leading case of Colvin v. Holbrook, 2 N. Y. 126 (1847), approved and followed in Fisher v. Meeker, 118 App. Div. 901, 103 N. Y. Supp. 261 (1907), and Costigan v. Newland, 12 Barb. 456 (1852).

The rule does not apply where the principal has no right to the money, and could not recover it from the agent. Winningham v. Fancher, 52 Mo. App. 458 (1893).

easily prove it: and if it was not paid over, yet the payment to her receiver was payment to her; and therefore the action ought to have been brought against her.

THE COURT, on Thursday 12th June last, were unanimous, that upon the facts stated in the report, the plaintiff ought not to recover against the defendant, in this action; and that the action ought to have been brought against Lady Windsor *herself*, and not against her agent: and therefore they discharged the rule for setting aside the non-suit. They thought, the principles upon which actions for money had and received to the plaintiff's use are founded, did not apply to the circumstances of the present case. It is a liberal action founded upon large principles of equity, where the defendant can not conscientiously hold the money. The defence is any equity that will rebut the action. This money was paid to the known agent of Lady W. He is liable to her for it; whether he has actually paid it over to her, or not: he received it for her. And Lord Mansfield expressed a dissent to the case of Jacob versus Allen, in 1 Salk. 27, and his approbation of Pond versus Underwood, in 2 Ld. Raym. 1210, 1211, which is contrary to it. He said, he kept clear of all payments to third persons, but where 'tis to a known agent: in which case, the action ought to be brought against the principal, unless in special cases, (as under notice, or mala fide.) But they were unanimous, both upon principles and authorities, that where a judge at nisi prius non-suits the plaintiff, and is mistaken; the Court, upon motion, may set aside the non-suit.

Rule discharged.

MOORE v. SHIELDS.

(Supreme Court of Judicature of Indiana, 1889. 121 Ind. 267, 23 N. E. 89.)

Suit to recover a sum of money paid to defendant for a township warrant, or note, issued in violation of his official duty, and without any consideration, by a township trustee. Judgment for defendant.

MITCHELL, C. J.[28] * * * There was evidence tending to prove that the appellants were paid a comparatively large sum for negotiating the township warrant in question, which was absolutely worthless They urged the plaintiff below to purchase, and recommended the paper as good, within their knowledge. There was evidence tending to show that they knew the paper was irregularly issued, without any consideration whatever; in short, that it was fraudulently issued. Under these circumstances they received the plaintiff's money; the latter paying it over to them in reliance upon the declaration made by them, that they had purchased a number of similar warrants as an investment, and that they regarded them as good as county or government bonds. It is said that the appellants were merely agents or brokers to sell the warrant; and that they are hence not liable, after having paid

[28] Part of the opinion is omitted.

over the money to their principal. The conclusion does not follow. "Even an auctioneer or broker who sells property for one who has no title, and pays over to his principal the proceeds, with no knowledge of the defect of title or want of authority, is held liable for its conversion to the real owner." Hills v. Snell, 104 Mass. 173; Alexander v. Swackhamer, 105 Ind. 81–86, 4 N. E. 433, 5 N. E. 908, 55 Am. Rep. 180, and cases cited.

Much more is a broker liable who sells and obtains money for worthless paper, which he knows has been fraudulently issued, in violation of law, even though he may have paid the money over to his principal. Where one person receives the money of another under such circumstances, that, in equity,—in good conscience,—he ought not to retain it, or otherwise dispose of it, except to return it to the person from whom it was received, an action for money had and received will lie to recover it back. McFadden v. Wilson, 96 Ind. 253.

In an action for money had and received, there need be no privity of contract proved, other than such as arises out of the fact that the defendant has received the plaintiff's money under circumstances which make it against conscience that he should retain it. Walker v. Conant, 65 Mich. 194, 31 N. W. 786; People v. Speir, 77 N. Y. 144; 3 Amer. & Eng. Cyclop. Law, 860. "If one man has obtained money from another through the medium of oppression, imposition, or deceit, such money is, in contemplation of law, received for the use of the injured party." In such a case the law implies a promise on the part of him who is in the wrong to return the money to the lawful owner. McQueen v. Bank, 2 Ind. 413; 4 Wait, Act. & Def. 469–471.[29]

The application of the principles above stated justify the judgment. We have found no error. The judgment is affirmed, with costs.

[29] If any person gets money into his hands illegally he cannot discharge himself by paying it over to another. Townson v. Wilson, 1 Campb. 396 (1808), per Ld. Ellenborough; Larkin v. Hapgood, 56 Vt. 597 (1884); Wallis v. Shelly (C. C.) 30 Fed. 747 (1887); Bocchino v. Cook, 67 N. J. Law, 467, 51 Atl. 487 (1902); Frye v. Lockwood, 4 Cow. 454 (1825), in which it appeared that the principal was really conducting the defense, though the action was against the agent. See, also, O'Conner v. Clopton, 60 Miss. 349 (1882), in which the agent was required to pay back usurious interest.

The agent is also liable when he receives the money without authority, and the principal refuses to enter into the contract. Simmonds v. Long, 80 Kan. 155, 101 Pac. 1070, 23 L. R. A. (N. S.) 553 (1909); U. S. v. Pinover (D. C.) 3 Fed. 305 (1880), in which the agent received money in good faith, but on a forged indorsement. When an act of bankruptcy has been committed by the principal before the agent pays over money to him the agent will be liable for the money. Ex parte Edwards, 13 Q. B. D. 747 (1884). Even if the agent acts in good faith, he will be liable if his principal had no right to the money, as where the principal intended to obtain representation to her deceased husband, and the agent received several debts and paid them over to her. When the widow failed of appointment as legal representative, the agent was held liable for the amounts. Sharland v. Mildon, 5 Hare, 469 (1846). In these cases the third person may elect which to hold, the principal or the agent, but an election to hold one is inconsistent with an intent to hold the other. The remedies are not concurrent. Eufaula Grocery Co. v. Mo. Nat. Bank, 118 Ala. 408, 24 South. 389 (1898).

D. OWEN & CO. v. CRONK.

(Queen's Bench Division of the High Court of Justice. [1895] 1 Q. B. Div. 265.)

Judd & Co., being financially embarrassed, put their business into the hands of trustees, by whom Cronk was appointed receiver. Owen & Co. had printing done by Judd & Co., and were presented by the manager with a bill which they claimed to be extortionate, but he refused to return to them the special blocks and type furnished by them until they paid. Under this "duress of goods," of which Cronk had no knowledge, they gave the manager a check, which Cronk indorsed and paid into his receivership account. Action to recover the excess charges.

LOPES, L. J. The case is not a difficult one to decide when once the facts are ascertained. It is said that the defendant was a receiver, not a mere servant. Upon the facts, it appears to me that he was an agent, not a principal, and in my opinion the learned judge has come to a right conclusion. The next question is, Had the defendant any knowledge that the money had been improperly obtained from the plaintiffs? In my opinion, there is no evidence that, at the time when the check was paid to Macintosh, the defendant knew anything of the circumstances under which the payment was made. The next question is, Did the defendant pay over the cheque to his principals before he had any notice that it had been wrongly obtained from the plaintiffs? The learned judge has come to the conclusion—and I think rightly—that he did. I think the law is clearly settled that if an agent has received for his principal money the payment of which has been wrongfully obtained, and he pays it over to the principal before he has any notice of the wrong, he is protected from any liability to the person who paid the money. But if, on the other hand, the agent, with notice of the wrong, pays the money to his principal, he will nevertheless be personally liable to the person who made the payment. Here the defendant, being an agent, paid the cheque to the account of his principals before he had had any notice that it had been improperly obtained from the plaintiffs. He has complied with the requirements of the law, and, therefore, the action cannot be maintained against him, and the decision of the learned judge was right.[30]

Appeal dismissed.

[30] The opinions of Esher, M. R., and Rigby, L. J., are omitted. Hauenstein v. Ruh, 73 N. J. Law, 98, 62 Atl. 184 (1905); McDonald v. Napier, 14 Ga. 89 (1853), in which the agent was paid a judgment to save the third person from a levy in execution, and the judgment was afterward set aside. The case contains a discriminating discussion of what will and what will not protect the agent.

WILLIAMS v. EVERETT.

(Court of the King's Bench, 1811. 14 East, 582.)

Lord ELLENBOROUGH, C. J.,[81] delivered the judgment of the Court. This was a case argued in this court, in the last Hilary and Easter terms, on a motion to set aside a nonsuit, which took place at a trial before me at the sittings at Guildhall after last Michaelmas term. The action was for money had and received, brought by the plaintiff to recover £300., being part of the amount of a bill of £1126. 2s., remitted by one James Kelly from the Cape of Good Hope to the defendant's house, in a letter dated Cape Town, 8th July 1809; in which Kelly says, "I remit you by the Warley £1126. 2s., which I particularly request you will order to be paid to the following persons, who will produce their letters of advice from me on the subject," etc. Amongst the persons, he names the plaintiff Williams (wine merchant, Gracechurch street), for £300. And he afterwards made another remittance for £500. on the same terms. And then he adds: "I desire the amounts paid each person to be put on the back of their respective bills," etc. "and that every bill paid off be cancelled." Williams by his attorney, long before the bills became due, gave the defendant Everett notice of a letter he had received from Kelly, ordering his debt of £300. to be paid out of that remittance, and offered him an indemnity of a banking house if he would hand over the bill to him; but Everett *refused* to indorse the bill away, or *to act upon the letter*; admitting, however, that he had received the letter directing the application of the money in the manner already stated. The question at the trial was, whether the plaintiff was entitled to receive from the defendants the amount of his demand on Kelly for £300. out of the bill for £1126. 2s. which was admitted to have been received by the defendants when it became due. * * * The question which has been argued before us is, whether the defendants, by receiving this bill, did not accede to the purposes for which it was professedly remitted to them by Kelly, and bind themselves so to apply it; and whether, therefore, the amount of such bill paid to them when due did not instantly become by operation of law money had and received to the use of the several persons mentioned in Kelly's letter as the creditors in satisfaction of whose bills it was to be applied, and of course, as to £300. of it, money had and received to the use of the plaintiff. It will be observed, that there is no assent on the part of the defendants to hold this money for the purposes mentioned in the letter; but, on the contrary, an express refusal to the creditor so to do. If, in order to constitute a privity between the plaintiff and defendants as to the subject of this demand, an

[81] Part of the opinion is omitted.

assent express or implied be necessary, the assent can in this case be only an implied one, and that too implied against the express dissent of the parties to be charged. By the act of receiving the bill, the defendants agree to hold it till paid, and its contents, when paid, for the use of the remitter. It is entire to the remitter to give, and countermand, his own directions respecting the bill as often as he pleases, and the persons to whom the bill is remitted may still hold the bill till received, and its amount when received, for the use of the remitter himself, until by some engagement entered into by themselves with the person who is the object of the remittance, they have precluded themselves from so doing, and have appropriated the remittance to the use of such person. After such a circumstance, they cannot retract the consent they may have once given; but are bound to hold it for the use of the appointee. If it be money had and received for the use of the plaintiff under the orders which accompanied the remittance, it occurs as fit to be asked, *when* did it become so? It could not be so before the money was received on the bill becoming due: and at that instant, suppose the defendants had been robbed of the cash or notes in which the bill in question had been paid, or they had been burnt or lost by accident, who would have borne the loss thus occasioned? Surely the remitter Kelly, and not the plaintiff and his other creditors, in whose favour he had directed the application of the money according to their several proportions to be made. This appears to us to decide the question: for in all cases of specific property lost in the hands of an agent, where the agent is not himself responsible for the cause of the loss, the liability to bear the loss is the test and consequence of being the proprietor, as the principal of such agent. The case of De Bernales v. Fuller and Co., which has been urged in argument on the part of the plaintiff, is clearly distinguishable from the present by this circumstance, that the defendants in that case, i. e. Fuller and Co., had antecedently received the bill, which was to be paid at their house, from Newnham and Co., the bankers of the plaintiff De Bernales, the holder, for the very purpose of receiving payment for them, the Newnhams, of such bill: and having taken the bill for this purpose, the Court thought that Fuller and Co. could not by themselves or their clerk renounce this purpose, but must apply the money, brought by Fuller's clerk specifically for the discharge of that bill then lying at their house, to that very purpose and no other; and that they were in effect to be regarded in that case as the plaintiff De Bernales' agents, through the intervention of Newnham's house, for the purpose of that receipt, and could therefore hold and apply it to no other. Here no agency for the plaintiff ever commenced, but was repudiated by the defendants in the first instance. We are of opinion, therefore, that upon no principle of law can the defendants be said to stand in such privity in respect to the plaintiff, as that the £300. claimed by this

action can be said to have been money had and received to the plaintiff's use: of course, therefore, the nonsuit must stand, and the rule for setting it aside be discharged.[32]

SECTION 2.—IN TORT

BULKELEY v. DUNBAR.[33]

(Court of Exchequer, 1792. 1 Anstruthers, 37.)

The bill stated, that one Valentine, the agent in London for the plaintiffs (merchants at Lincoln), having received bills from them, to be by him indorsed on their account as required, was, by menaces, compelled to endorse them to the defendants for a debt of his own. The bill prayed a discovery of these matters, and that the notes might be delivered up. The defendant, Dunbar, in his answer said, that he had only acted as agent for the defendant Duff, and disclaimed having

[32] There is much confusion in the cases. In Hall v. Marston, 17 Mass. 575 (1822), it is laid down as settled law that "if A. promises B. for a valuable consideration to pay C., the latter may maintain assumpsit for the money." The court, perhaps properly, distinguishes the case from Williams v. Everett, supra, on the ground that in that case there was no promise to pay, but a positive refusal of the agent to act. This was approved in Lawrence v. Fox, 20 N. Y. 268 (1859) (vigorous dissenting opinion by Comstock, J.), the court holding that "the law operating on the act of the parties creates the duty, establishes a privity, and implies the promise and obligation on which the action is founded." The application of the doctrine was strictly limited in New York. Barlow v. Myers, 64 N. Y. 43, 21 Am. Rep. 582 (1876) with review of cases; Wheat v. Rice, 97 N. Y. 296 (1884), in which the promise was not made to pay any definite parties, but only indefinite creditors; and it may be doubted if it applied to an agent receiving money from his principal for a third person, but making no undertaking to pay according to directions; Seaman v. Whitney, 24 Wend. 260, 35 Am. Dec. 618 (1840), not disproved in the later cases. See, also, Meyer v. Stitz, 9 N. Y. Supp. 805 (1890); Burton v. Larkin, 36 Kan. 246, 13 Pac. 398, 59 Am. Rep. 541 (1887). In Massachusetts the same limitations are to be noted, and it is difficult to reconcile later cases with Hall v. Marsten, supra. Borden v. Boardman, 157 Mass. 410, 32 N. E. 469 (1892). See also the early cases of Denny v. Lincoln, 5 Mass. 385 (1809), and Freeman v. Otis, 9 Mass. 272, 6 Am. Dec. 66 (1812).

In Maine the doctrine of Hall v. Marsten, supra, has been given a very broad application. Keene v. Sage, 75 Me. 138 (1883), which the New Jersey court has declined to follow; Nolan v. Manton, 46 N. J. Law, 231, 50 Am. Rep. 403 (1884), following the earlier case of Sergeant v. Stryker, 16 N. J. Law, 464, 32 Am. Dec. 404 (1837). In the case of money received by the agent from his principal for a third person it would seem that his duty is to his principal alone. Colvin v. Holbrook, 2 N. Y. 126 (1848); Hall v. Lauderdale, 46 N. Y. 70 (1871), until the agent promises to pay the third person, Goodwin v. Bowden, 54 Me. 424 (1867), or enters into some engagement with the third person to pay it over, Stevens v. Hill, 5 Esp. 247 (1805), per Lord Ellenborough, Tierman v. Jackson, 5 Pet. 580, 599, 8 L. Ed. 234 (1831). Until the agent has done some act recognizing the appropriation of the money to the particular purposes specified, the money is at the risk of the principal and subject to his recall. Tierman v. Jackson, supra; Malcolm v. Scott, 5 Exch. 601 (1850).

[33] Accord: Campbell v. Hillman, 15 B. Mon. 508, 61 Am. Dec. 195 (1854); Riley v. Bell, 120 Iowa, 618, 95 N. W. 170 (1903).

anything in the notes; and therefore insisted on being struck out as a party; and only examined as a witness. Exceptions to this answer were taken, and allowed.

By the COURT. When an agent commits a fraud, he is answerable as principal, to the person injured, who is not to be sent round to seek the party benefited by the fraud. If the money or notes had been received bona fide by the agent, and he had paid it over before action brought, that would have been a good defense; but here there is a direct charge of fraud, which must be answered. And this is not such a criminal charge as will screen him from the discovery sought.

GARRETT v. SPARKS BROS.

(Supreme Court of Washington, 1911. 61 Wash. 397, 112 Pac. 501.)

GOSE, J. This is a suit to recover money alleged to have been obtained from the plaintiff through the fraud of the defendant. There was a verdict and judgment for the plaintiff. The defendant has appealed.

There is abundant evidence to support the judgment. The testimony of the respondent shows that the appellant was acting as agent for the Plantations Company for the sale of certain tracts of orchard land; that the appellant represented to the respondent that the Plantations Company owned a piece of land called "Plantations," divided into small tracts, free and clear of all incumbrances; that the respondent, believing and relying upon the representations, paid the appellant $1,000 on the purchase price of one of the tracts; that the representations were false, and that the Plantations Company, as the appellant well knew, did not own the land, but that it had only a contract of purchase, which it later forfeited.

The appellant argues that the only issue is "the responsibility of an agent to answer to a third person for the default of a disclosed principal." On the contrary, the issue is the liability of the appellant to answer for its own fraud. The appellant cites in support of its contention Wilson v. Wold, 21 Wash. 398, 58 Pac. 223, 75 Am. St. Rep. 846; Nelson v. Title Trust Company, 52 Wash. 258, 100 Pac. 730, and Davis v. Lee, 52 Wash. 330, 100 Pac. 752, 132 Am. St. Rep. 973. They have no application to the present issue. It is fundamental that a party, whether acting for himself or another, is liable in damages for his own fraud. The fact that the principal is also liable does not relieve from responsibility the party who actually commits the wrong. In such cases, the liability of the principal can only rest upon the delict of its agent. The party who has been wronged may elect to sue either or both.[84]

The judgment is affirmed.

[84] Where intent is necessary, as in malicious prosecution or fraud, the agent must share the wrongdoing. He will then be a principal, for in torts all are wrongdoers, and the rule of principal and agent does not exist. Car-

PERKINS v. SMITH.[85]

(Court of King's Bench, 1752. 1 Wilson, 328.)

In trover, the jury find a special verdict which in substance is shortly this. That upon the 22d of September 1749 Hughes was possessed of the goods in the declaration as his own property, and became a bankrupt that day, that the plaintiff is assignee under the commission; that upon the 23d of September 1749, the defendant Smith, who is servant and riding clerk to Mr. Garraway to whom the bankrupt was considerably indebted, went to the bankrupt's shop (to try to get his master's money) and found it shut up, and that the bankrupt delivered to Smith the goods in the declaration, who gave a receipt for the same in the name of his master, and sold the same for his master's use.

It was objected that the action was improperly brought *against* the *servant* Smith, who acted wholly in this matter for his *master*, and that the *conversion* is found to be to the use of his *master*, which is the *gist* of an action of *trover;* after two arguments at the bar, the court gave judgment for the plaintiff.

LEE, Chief Justice. The point is, whether the defendant is not a *tort-feasor*, for if he is so, no *authority* that he can derive from his *master* can excuse him from being liable in this action.

Hughes the bankrupt had no right to deliver these goods to Smith; the *gist* of *trover* is the *detainer* or *disposal* of goods (which are the property of another) *wrongfully;* and it is found that the defendant

raher v. Allen, 112 Iowa, 168, 83 N. W. 902 (1900); Weber v. Weber, 47 Mich. 569, 11 N. W. 389 (1882); Gutchess v. Whitney, 46 Barb. 139 (1866); Hecker v. De Grott, 15 How. Prac. (N. Y.) 314 (1857), distinguishing between an agent as an unconscious instrument and a knowing participant in a fraud; Wimple v. Patterson (Tex. Civ. App.) 117 S. W. 1034 (1909), excusing the agent when he honestly believes the representations made by him.

[85] Accord: McPheters v. Page, 83 Me. 234, 22 Atl. 101, 23 Am. St. Rep. 772 (1891). Cf. Greenway v. Fisher, 1 C. & P. 190, 12 E. C. L. 118 (1824). Many of the English cases of conversion by an agent involve the disposal of goods of a bankrupt, which may account for the somewhat extreme application of the doctrine of conversion against the agent. See Stephens v. Elwell, 4 M. & S. 259, 16 Rev. Rep. 458 (1815), a leading case. Many American cases refuse to go so far, and criticise the extensive application of the action of trover against an agent who has acted in good faith for his principal. See Rogers v. Huie, 2 Cal. 571, 56 Am. Dec. 363 (1852), which limits the agent's liability to cases where he has either appropriated the goods of the third person to his own use, or has by some other act deprived the owner of his property with wrongful intent, expressed or implied. In Spooner v. Holmes, 102 Mass. 503, 5 Am. Rep. 491 (1869), though extending the liability to an agent who in good faith sells the goods of a third person supposing them to belong to his principal, the court nevertheless carefully limits the application of the doctrine to an agent acting in good faith. For interesting discussions, see Lafayette Co. Bank v. Metcalf, 40 Mo. App. 494 (1890); Lee v. Bayes, 18 C. B. 599, 2 Jur. (N. S.) 1093, 25 L. J. C. P. 249, 86 E. C. L. 599 (1856); and Fowler v. Hollins, L. R. 7 Q. B. 616, 41 L. J. Q. B. 277, 27 L. T. Rep. (N. S.) 168, 20 W. R. 868 (1872), affirmed in L. R. 7 H. L. Cas. 757, 44 L. J. Q. B. 169, 33 L. T. Rep. N. S. 73 (1874).

himself *disposed* of them to his *master's use,* which his *master* could give him no *authority* to do; and this is a *conversion* in Smith, this *disposal* being his own *tortious* act; the *act of selling* the goods *is the conversion,* and whether to the use of himself, or another, it makes no difference; I am very well satisfied that this *servant* has done wrong, and that no authority that could be derived from his *master before,* or *after* the fact, can excuse him.

The finding that the defendant disposed of the goods for his *master's use* is only the conclusion of the jury, and does not bind the court, the taking upon him to *dispose* of another's property is the *tortious* act, and the *gist* of this action. Judgment for the plaintiff per totam curiam.

HEUGH v. EARL OF ABERGAVENNY AND DELVES.[86]

(Superior Courts of England and Ireland, 1874. 23 W. R. 40.)

The bill in this suit stated that the plaintiff was owner of certain land in Kent, abutting on that of the defendant, the earl of Abergavenny, and that some dispute having arisen between the plaintiff and the said defendant as to a weir situate on the plaintiff's land, the said defendant and the defendant Delves, a land agent who professed to act on his behalf had respectively threatened and still intended to enter forcibly on the plaintiff's land and to pull down and destroy the weir. The bill prayed for an injunction to restrain the defendants from so doing.

The defendant Delves demurred to the bill for want of equity on the ground that he had no interest, being a mere agent acting under the instructions of the other defendant.

JESSEL, M. R., said there could be no agency as between wrongdoers. Want of interest was no defense to a charge of tort, though committed under the direction of another. The wrongdoer became personally liable. The demurrer must be overruled.

DENNY v. MANHATTAN CO.

(Supreme Court of New York, 1846. 2 Denio, 115.)

Case, for alleged violation of duty by defendants, as agents of the Planters' Bank of Tennessee, in refusing to permit a transfer to plaintiffs on the transfer books of the Planters' Bank, kept by them, of 281 shares of stock in that bank, alleged to belong to plaintiffs as trustees.

PER CURIAM. We entertain a pretty strong impression that the plaintiffs have failed to show a good title to the stock; but our decision will be put upon another ground, concerning which we have had

[86] Accord: Thorp v. Burling, 11 Johns. 285 (1814). Ignorance of the trespass will not save the agent. Higginson v. York, 5 Mass. 341 (1809).

no doubt from the moment the case was opened. If the plaintiffs have a cause of action against any one, it is not against the defendants, but against the Planters' Bank of Tennessee. The defendants were not the agent of the plaintiffs and owed them no duty. They were the agent of the Planters' Bank; and for a neglect to discharge their agency, they are answerable to their principal and to no one else. If third persons are injured by the neglect of a known agent, the rule is respondeat superior, and generally the action must be brought against the principal.

Judgment for defendants.

FELTUS v. SWAN.[87]

(Supreme Court of Mississippi, 1884. 62 Miss. 415.)

Action for damages resulting from the neglect and refusal of defendant, as agent of the owner of a plantation, to keep open a drain, by reason of which water was backed up on the land of plaintiff. The court below sustained a demurrer to the declaration.

CAMPBELL, C. J. The appellee being a mere agent was not liable for an omission of duty except to his principal. Story on Agency, §§ 308, 309; Wharton on Agency, §§ 535, 536; Dunlap's Paley's Agency, 396.

The proposed amendment would not have made the declaration good, for whatever motive operated on the agent, the charge against him was only that he had failed to do, and not that he had done anything maliciously, and for nonfeasance or omission to act at all the agent is answerable only to his employer.

Affirmed.

GREENBERG v. WHITCOMB LUMBER CO. et al.

(Supreme Court of Wisconsin, 1895. 90 Wis. 225, 63 N. W. 93, 28 L. R. A. 439, 48 Am. St. Rep. 911.)

Action for damages for personal injury caused by a defective saw in defendants' sawmill. Defendant Semple was manager of the mill. The case came up on demurrers.

NEWMAN, J.[88] [After holding that the complaint states a cause of action as to the company:] * * * Whether the complaint states a cause of action against the defendant Parlan Semple is more complex. He was the agent or servant of the Whitcomb Lumber Company, charged with the oversight and management of its operations, and with the duty of providing a safe machine for the work

[87] Accord: Delaney v. Rochereau, 34 La. Ann. 1123, 44 Am. Rep. 456 (1882). Cf. the cases following.

[88] Part of the opinion is omitted.

in which the plaintiff was engaged. The principle is well settled that the agent or servant is responsible to third persons only for injuries which are occasioned by his misfeasance, and not for those occasioned by his mere nonfeasance. Some confusion has arisen in the cases, from a failure to observe clearly the distinction between nonfeasance and misfeasance. These terms are very accurately defined, and their application to questions of negligence pointed out, by Judge Metcalf in Bell v. Josselyn, 3 Gray, 309, 63 Am. Dec. 741. "Nonfeasance," says the learned judge, "is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person might lawfully do; malfeasance is the doing of an act which a person ought not to do at all."

The application of these definitions to the case at bar is not difficult. It was Semple's duty to have had this machine safe. His neglect to do so was nonfeasance. But that alone would not have harmed the plaintiff, if he had not set him to work upon it. To set him to work upon this defective and dangerous machine, knowing it to be dangerous, was doing improperly an act which one might lawfully do in a proper manner. It was misfeasance. Both elements, nonfeasance and misfeasance, entered into the act, or fact, which caused the plaintiff's damages. But the nonfeasance alone could not have produced it. The misfeasance was the efficient cause. For this the defendant Semple is responsible to the plaintiff. Mechem, Ag. § 569 et seq.; 14 Am. & Eng. Enc. Law, 873, and cases cited in note 4; Wood, Mast. & Serv. (2d Ed.) 667; Osborne v. Morgan, 130 Mass. 102, 39 Am. Rep. 437.[89]

The complaint states but a single cause of action. It is the same cause of action against both defendants, arising from the same acts of negligence,—the master for the negligence of its servant; the servant for his own misfeasance. Both master and servant, being liable for the same acts of negligence, may be joined as defendants. Wood, Mast. & Serv. supra: Wright v. Wilcox, 19 Wend. 343, 32 Am. Dec. 507; Phelps v. Wait, 30 N. Y. 78.

The order appealed from by the Whitcomb Lumber Company is affirmed, and the order appealed from by the plaintiff is reversed.

[89] See the illuminating discussion of Cobb, P. J., in So. Ry. Co. v. Grizzle, 124 Ga. 735, 53 S. E. 244, 110 Am. St. Rep. 191 (1906), which holds that when once the agent has entered upon the performance of his contract with his principal he is responsible for omissions, or commissions, in the execution of his agency whereby some third person is injured, to the same extent as if he had committed the wrong in his own behalf. Also, Ellis v. McNaughton, 76 Mich. 237, 42 N. W. 1113, 15 Am. St. Rep. 308 (1889).

BAIRD v. SHIPMAN.

(Supreme Court of Illinois, 1890. 132 Ill. 16, 23 N. E. 384, 7 L. R. A. 128, 22 Am. St. Rep. 504.)

PER CURIAM. The following opinion of the appellate court fully presents the question arising upon this record:

"GARNETT, P. J. This is an appeal from a judgment for damages, founded on the alleged negligence of appellants, by which the death of Joseph Garnett, appellee's intestate, is said to have been caused. The place where the injury happened was in a barn situated on premises on Michigan avenue, in Chicago, belonging to Aaron C. Goodman, who was then, and for several years before had been, a resident of Hartford, Conn. Appellants were his agents for renting the premises during the years 1884 and 1885, and during both years were carrying on the real-estate business in Chicago. On the trial, evidence was given tending to show that they had in fact complete control of the premises, with the residence and barn thereon, repairing the same, in their discretion; and there was no proof that in such matters they received any directions from the owner. The property was rented by appellants to Emma R. Wheeler and A. R. Tillman from April 1, 1884, to April 30, 1885, and to Emma R. Wheeler from May 1, 1885, to April 30, 1886. Both leases were in writing, and by the terms of each lease the tenants covenanted to keep the premises in good repair. The tenant in the last lease rented the premises to Nellie E. Pierce, who occupied the same from April 28 to September, 1885. The evidence tends to prove that when the lease was made to Emma R. Wheeler the large carriage door to the barn was in a very insecure condition, and that appellants, through one Warner, the manager of their renting department, verbally agreed with Mrs. Wheeler to put the premises in thorough repair. Nothing was done to improve the condition of the door; and on June 12, 1885, while the deceased, an expressman by occupation, was engaged in delivering a load of kindling in the barn for one of the parties living in the house, the door, weighing about 400 pounds, fell from its fastenings, and injured him to such an extent that he died the next day.

"Appellants make two points: (1) That the verdict is clearly against the weight of the evidence; (2) that they were the agents of the owner, (Goodman,) and liable to him only for any negligence attributable to them.

"There is nothing more than the ordinary conflict of evidence found in such cases, presenting a question of fact for the jury; and the finding must be respected by this court, in deference to the well-settled rule.

"The other point is not so easily disposed of. An agent is liable to his principal only for mere breach of his contract with his princi-

pal; but he must have due regard to the rights and safety of third persons. He cannot in all cases find shelter behind his principal. If, in the course of his agency he is intrusted with the operation of a dangerous machine, to guard himself from personal liability, he must use proper care in its management and supervision, so that others, in the use of ordinary care, will not suffer in life, limb, or property. Suydam v. Moore, 8 Barb. 358. Phelps v. Wait, 30 N. Y. 78. It is not his contract with the principal which exposes him to, or protects him from, liability to third persons, but his common-law obligation to so use that which he controls as not to injure another. That obligation is neither increased nor diminished by his entrance upon the duties of agency; nor can its breach be excused by the plea that his principal is chargeable. Delaney v. Rochereau, 34 La. Ann. 1123, 44 Am. Rep. 456.

"If the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot escape this duty by abandoning its execution midway, and leaving things in a dangerous condition, by reason of his having so left them without proper safeguards. Osborne v. Morgan, 130 Mass. 102, 39 Am. Rep. 437.

"A number of authorities charged the agent, in such cases, on the ground of misfeasance, as distinguished from nonfeasance. Mechem, in his work on Agency, § 572, says: 'Some confusion has crept into certain cases from a failure to observe clearly the distinction between nonfeasance and misfeasance. As has been seen, the agent is not liable to strangers for injuries sustained by them, because he did not undertake the performance of some duty which he owed to his principal, and imposed upon him by his relation, which is nonfeasance. Misfeasance may involve, also, to some extent, the idea of not doing, as where the agent, while engaged in the performance of his undertaking, does not do something which it was his duty to do under the circumstances,—does not take that precaution, does not exercise that care, which a due regard for the rights of others requires. All this is not doing; but it is not the not doing of that which is imposed upon the agent merely by virtue of his relation, but of that which is imposed upon him by law, as a responsible individual, in common with all other members of society. It is the same not doing which constitutes actionable negligence in any relation.' To the same effect are Lottman v. Barnett, 62 Mo. 159; Martin v. Benoist, 20 Mo. App. 263; Harriman v. Stowe, 57 Mo. 93; Bell v. Josselyn, 3 Gray, 309, 63 Am. Dec. 741.

"A case parallel to that now in hand is Campbell v. Sugar Co., 62 Me. 552, 16 Am. Rep. 503, where agents of the Portland Sugar Company had the charge and management of a wharf belonging to the company, and rented the same to tenants, agreeing to keep it in re-

pair. They allowed the covering to become old, worn, and insecure, by means of which the plaintiff was injured. The court held the agents were equally responsible to the injured person with their principals.

"Wharton, in his work on Negligence, § 535, insists that the distinction, in this class of cases, between nonfeasance and misfeasance can no longer be sustained,[40] that the true doctrine is that when an agent is employed to work on a particular thing, and has surrendered the thing in question into the principal's hands, then the agent ceases to be liable to third persons for hurt received by them from such

[40] The whole distinction between nonfeasance and misfeasance is vigorously attacked, and the basis of decision in such cases is put instead on the maxim sic utere tuo ut alienum non lædas, in Lough v. John Davis & Co., 30 Wash. 204, 70 Pac. 491, 59 L. R. A. 802, 94 Am. St. Rep. 848 (1902). The rule that the agent's liability to third persons in tort depends on whether the wrong consists in a nonfeasance or a misfeasance seems to go back to Lord Holt's statement in Lane v. Cotton, 1 Ld. Raym. 646, 12 Mod. 488 (1701), that, "a servant or deputy quatenus such cannot be charged for neglect, but the principal only shall be charged for it; but for a misfeasance an action will lie against a servant or deputy, but not quatenus deputy or servant, but as a wrongdoer." As has been pointed out, not only was this a dissenting opinion, but this question was not even involved in the case, nor was it involved in Stone v. Cartwright, 6 T. R. 411 (1795), which was cited as authority for it. Nevertheless so weighty was the word of Lord Holt, that his dictum in a dissenting opinion was followed by Story on Agency, § 308, and by great numbers of decisions, many of which found it necessary to newly define nonfeasance in order to fasten liability on an agent for a wrong done to a third person, which ordinarily would be called mere neglect, or nonfeasance. See Bell v. Josselyn, 3 Gray, 309, 63 Am. Dec. 741 (1855); Osborne v. Morgan, 130 Mass. 102, 39 Am. Rep. 437 (1881), approved in Stiewel v. Borman, 63 Ark. 30, 37 S. W. 404 (1896); Hagerty v. Montana Ore Purchasing Co., 38 Mont. 69, 98 Pac. 643, 25 L. R. A. (N. S.) 356 (1908); Gas Co. v. Connor, 114 Md. 140, 157, 78 Atl. 725, 32 L. R. A. (N. S.) 809 (1910); Schlosser v. Railway Co., 20 N. D. 406, 127 N. W. 502 (1910).

Others, by following the rule, and adhering to the ordinary meaning of nonfeasance, arrive at decisions in conflict with these last. Delaney v. Rochereau, 34 La. Ann. 1123, 44 Am. Rep. 456 (1882); Henshaw v. Noble, 7 Ohio St. 226 (1857); Erwin v. Davenport, 9 Heisk. 44 (1871); Feltus v. Swan, supra; Drake v. Hagan, 108 Tenn. 265, 67 S. W. 470 (1902); Van Antwerp v. Linton, 89 Hun, 417, 35 N. Y. Supp. 318 (1895), citing the dictum of Andrews, J., in Murray v. Usher, 117 N. Y. 542, 23 N. E. 564 (1889).

Still others hold that the liability does not grow out of any privity of parties or of any relation of agency. It does not rest in contract at all, but on the common-law obligation of all to so use what they control as not to injure another, whether in the use of their own, or of the property of another as agent. In this view the question is, was there a duty and has it been violated? Lough v. John Davis & Co., supra; Ellis v. So. Ry. Co., 72 S. C. 465, 52 S. E. 228, 2 L. R. A. (N. S.) 378 (1905). Note to Baird v. Shipman, supra, in 22 Am. St. Rep. 512; note to Mayer v. Thompson-Hutchinson Bldg. Co., 104 Ala. 611, 16 South. 620, 53 Am. St. Rep. 88, in 28 L. R. A. 433 (1894); Parry v. Smith, L. R. 4 C. P. Div. 325, 48 L. J. C. P. 731, 41 L. T. Rep. (N. S.) 93, 27 W. R. 801 (1875).

According to all the cases the agent is not liable for injuries due to causes outside the scope of his agency and of his acts under it. Kuhnert v. Angell, 10 N. D. 59, 84 N. W. 579, 88 Am. St. Rep. 675 (1900). But he is liable for acts of misfeasance in the performance of his agency. Harriman v. Stowe, 57 Mo. 93. The principal is also liable. The liability of the agent is primary, that of the principal secondary. If the agent is innocent, so is the principal. Bradley v. Rosenthal, 154 Cal. 420, 97 Pac. 875, 129 Am. St. Rep. 171 (1908).

thing, though the hurt is remotely due to the agent's negligence, the reason being that the causal relation between the agent and the person hurt is broken by the interposition of the principal as a distinct center of legal responsibilities and duties, but that, even where there is no such interrupting of causal connection, and the agent's negligence directly injures a stranger, the agent having liberty of action in respect to the injury, then such stranger can recover from the agent damages for the injury.

"The rule, whether as stated by Mechem or Wharton, is sufficient to charge appellants with damages, under the circumstances disclosed in this record. They had the same control of the premises in question as the owner would have had if he had resided in Chicago, and attended to his own leasing and repairing. In that respect, appellants remained in control of the premises until the door fell upon the deceased. There was no interruption of the causal relation between them and the injured man. They were, in fact, for the time being, substituted in the place of the owner, so far as the control and management of the property was concerned. The principle that makes an independent contractor, to whose control premises upon which he is working are surrendered, liable for damages to strangers caused by his negligence, although he is at the time doing the work under contract with the owner (Whart. Neg. § 440), would seem to be sufficient to hold appellants. The owner of cattle, who places them in the hands of an agister, is not liable for damages committed by them while they are under control of the agister. It is the possession and control of the cattle which fix the liability; and the law imposes upon the agister the duty to protect strangers from injury by them. Ward v. Brown, 64 Ill. 307, 16 Am. Rep. 561; Ozburn v. Adams, 70 Ill. 291.

"When appellants rented the premises to Mrs. Wheeler in the dangerous condition shown by the evidence, they voluntarily set in motion an agency which, in the ordinary and natural course of events, would expose persons entering the barn to personal injury. Use of the barn, for the purpose for which it was used when the deceased came to his death, was one of its ordinary and appropriate uses, and might, by ordinary foresight, have been anticipated. If the insecure condition of the door fastening had arisen after the letting to Mrs. Wheeler, a different question would be presented; but, as it existed before and at the time of the letting, the owner or persons in control are chargeable with the consequences. Gridley v. Bloomington, 68 Ill. 47; Tomle v. Hampton, 129 Ill. 379, 21 N. E. 800. Neither error is well assigned, and the judgment is affirmed."

We fully concur in the legal proposition asserted in the foregoing opinion, and deem it unnecessary to add to what is therein said in support of that proposition. The judgment is affirmed.

CHAPTER IV

LIABILITY OF THIRD PERSONS TO THE AGENT

SECTION 1.—IN CONTRACT

GUNN v. CANTINE.

(Supreme Court of Judicature of New York, 1813. 10 Johns. 387.)

Assumpsit for money had and received, to the use of plaintiff. Gunn was agent to collect money for Stephen Simmons and gave the contract to Cantine for collection. Cantine collected and refused to account to Gunn.

PER CURIAM. It appears affirmatively, from the case, that the plaintiff had no beneficial interest in the money collected. He was a mere attorney employed by Simmons to collect this debt; and there was no express promise by the defendant to pay the money collected to the plaintiff.

The letter of attorney was revocable at pleasure; and the law will not raise any assumpsit to the plaintiff from the facts in this case. This is, by no means, so strong a case as that of Pigott v. Thompson, 3 Bos. & Pull. 147, and yet in that case the agent was not permitted to sue in his own name. The defendant is entitled to judgment.

Judgment for the defendant.

THATCHER v. WINSLOW.[1]

(Circuit Court of the United States, 1828. 5 Mason, 58, Fed. Cas. No. 13,863.)

Assumpsit on certain notes made by Lewis Rousmaniere, payable to the defendant [Andrew Winslow], or his order, at the Merchants' Bank in Newport. The declaration contained various counts against the defendant, as indorsee, in favour of the plaintiff [David Thatcher] as indorser. Plea, the general issue.

At the trial, the defence turned principally upon the point of forgery of the defendant's name, as indorser, by Rousmaniere. Another point was made, viz., that the plaintiff was not the owner of the notes

[1] Accord: Cocke v. Dickens, 4 Yerg. 29, 26 Am. Dec. 214 (1833). An agent may sue in his own name on a note indorsed in blank and put into his hands for collection, unless his right is controverted by evidence. Orr v. Lacy, 4 McLean, 243, Fed. Cas. No. 10,589 (1847).

in question, but that they belonged to the Merchants' Bank at Newport, by which bank they were originally discounted; and that the notes, since the death of Rousmaniere (who committed suicide), had been delivered to the plaintiff by the Merchants' Bank for the purpose of suing the same in his own name in the circuit court; and that plaintiff had no interest whatsoever therein. A witness, called for the plaintiff, upon his cross examination, fully established the latter point.

STORY, Circuit Justice. If the facts stated by the witness on this last point are not denied, I think the cause is at an end. Unless the plaintiff is a real holder of the note, and has some interest in it, he cannot maintain an action as indorsee against the defendant. Here the proof is, that the Merchants' Bank is the real holder, and the plaintiff is merely an agent for the bank. I take it not to be competent for a mere agent to maintain an action on a negotiable note in his hands, although it be with the consent of his principal. He must be the owner of the note, or have some substantial interest therein. Prima facie indeed the possession of such a note is evidence of the party's being a holder for a valuable consideration, and unless the note has been previously stolen, or received by him under suspicious circumstances, he is not bound to prove by other evidence, that he is such a bona fide holder. But if it is admitted or proved aliunde, that he is but a mere agent, and holds the note as such, he is not competent to recover a judgment upon it in his own name. See Gunn v. Cantine, 10 Johns. 387; Gilmore v. Pope, 5 Mass. 491.

The plaintiff discontinued his suit.

SARGENT v. MORRIS.

(Court of King's Bench, 1820. 3 Barn. & Ald. 277, 22 R. R. 382, 5 E. C. L. 166.)

Declaration stated, that the defendant was the owner of a vessel lying in the river Gaudalquiver, and bound to London; and the plaintiff, at the special instance and request of the defendant, caused to be shipped on board the vessel certain goods, to be taken care of, and safely and securely conveyed by the defendant within the vessel, under the deck thereof, to London, and there to be safely delivered, dry and well conditioned, for the plaintiff; and in consideration thereof, and of a certain freight to be paid by plaintiff to defendant, he undertook to take care of and safely convey the said goods and merchandizes, within the vessel, and under the deck thereof, and deliver the same as aforesaid. Breach, that the defendant placed and put the goods upon the deck of the vessel, and otherwise conducted himself with great negligence, by reason whereof the goods were greatly damaged. Plea non-assumpsit. At the trial before Abbott, C. J., at the London sittings

after last Trinity term, it appeared that the goods were shipped by Bayo & Son of Seville, and that they were the parties interested in the goods. By the bill of lading, the Captain acknowledged to have received on board the vessel, and under the deck thereof, of Don Pedro Bayo & Son, the goods therein mentioned; and it then proceeded in the following words: "I undertake to deliver the same to you, and in your name, according to custom and usage, to Mr. Sargent or his assigns, paying freight," etc. The plaintiff on receiving advice of the shipment, effected an insurance on account of Bayo, and advanced the premiums. It was objected, that the action ought to have been brought by Bayo & Son, and not by the present plaintiff. The Lord Chief Justice directed the jury to find a verdict for the plaintiff, with liberty to the defendant to move to enter a nonsuit. A rule nisi having been obtained accordingly.

BAYLEY, J. This is an action on a special contract; and the declaration states, that the plaintiff caused to be shipped on board the defendant's vessel, certain goods, to be carried and delivered to the plaintiff, and that he undertook and promised the plaintiff accordingly. The declaration therefore describes the plaintiff as the original shipper, and the original contract as having been made with him. Now I take the rule to be this: if an agent acts for me and on my behalf, but in his own name, then, inasmuch as he is the person with whom the contract is made, it is no answer to an action in his name, to say, that he is merely an agent, unless you can also show, that he is prohibited from carrying on that action by the person on whose behalf the contract was made. In such cases, however, you may bring your action, either in the name of the party by whom the contract was made, or of the party for whom the contract was made.[2] In policies of insurance, it is a common practice to bring your action, either in the name of the agent or *principal*. In this case the contract appears, by the terms of the bill of lading, to have been made with the Spanish house. Then for whom was it made? why, upon the evidence in the cause, on account of the Spanish house. It is, however, urged, that inasmuch as Sargent had made certain advances on their account, they were his goods at the time of the shipment. Now, in the first place, there is no evidence to show, that, *at the time of the shipment,* he had made any advance whatever. At that time, the right of action was vested in the party to whom the goods belonged. What was done subsequently does not affect this point. As to the advance, I take it to have been made in the ordinary way in which an agent makes an advance for his princi-

[2] In Tinsley v. Dowell, 87 Tex. 23, 26 S. W. 946 (1894), the court lays down the rule that one who contracts as agent cannot maintain an action in his own name and right upon the contract. To this general rule there are four exceptions: (1) Where the agent contracts in his own name; (2) where he does not disclose his principal who is unknown; (3) where, by the usages of trade, the agent is authorized to act as owner of the property; (4) where the agent has an interest in the subject-matter of the contract, and in this case whether he professed to act as agent or not.

pal, in respect of which he would be entitled to sue his principal, on whose credit the advance was made. If, indeed, the goods had reached his possession, he might have had a lien till he had been repaid; but no lien can take place till the goods come into his possession. The prospect of a lien made in respect of advances subsequent to the shipment, never can satisfy the allegation of the plaintiff, that he had caused the goods to be shipped, and that the defendants contracted with him to deliver; the contract, in fact, was not with him, but with Bayo. For these reasons, it seems to me, that the contract is not made out in evidence, and that the action cannot be supported.[3]

MILLER v. STATE BANK OF DULUTH.[4]

(Supreme Court of Minnesota, 1894. 57 Minn. 319, 59 N. W. 309.)

Suit by Miller for balance of money deposited by him as agent. The bank claimed the equitable right to set off against the deposit notes indorsed by Simon Clark & Co. and held by the bank. Judgment for plaintiff, new trial denied, and defendant appeals.

GILFILLAN, C. J. Plaintiff was agent for Simon Clark & Co., and, as such, deposited money of theirs with defendant to the credit of himself—"A. J. Miller, Agent." Afterwards Simon Clark & Co. made an assignment in insolvency. Whether plaintiff could or could not, while his agency continued, maintain an action in his own name on the deposit, he certainly could not after his relation to the deposit ceased by the revocation of his agency with respect to it.

The assignment of his principals, Simon Clark & Co., worked such revocation. Order reversed.

LETERMAN v. CHARLOTTESVILLE LUMBER CO.

(Supreme Court of Appeals of Virginia, 1910. 110 Va. 769, 67 S. E. 281.)

Assumpsit. Judgment for plaintiff.

BUCHANAN, J.[5] In the view we take of this case, the only question necessary to be considered is whether or not the trial court erred in striking out the special plea filed by Leterman (the plaintiff in error), who was defendant in that court.

One objection made to the plea is: "That the plea sets forth the fact that the contract between the plaintiff and defendant was entered into by the defendant on behalf of a firm, composed of himself and one Alfred Wollberg, which matter has been already formally and finally

[3] The opinions of Abbott, C. J., and Best, J., are omitted.

[4] Accord: Sims v. Bond, 5 B. & Ad. 389, 2 N. & M. 608, 27 E. C. L. 97 (1833).

[5] Part of the opinion is omitted.

adjudicated by submitting that question to a jury at a former term of this court, as is shown in writing filed by the plaintiff, by counsel, as one of the grounds for excluding said plea."

The only effect of the verdict of the jury upon the issue raised by the plea in abatement for the nonjoinder of Alfred Wollberg as a party defendant was to establish the fact that the contract, for the breach of which the plaintiff sought to recover damages, was made with Leterman personally, and not with the firm of Leterman & Wollberg, and that the plaintiff had the right to sue the former for a breach of the contract. It did not determine that Leterman, in making that contract, may not have been acting, as averred in his special plea, in behalf of the firm of Leterman & Wollberg. That question was not involved in the issue on the plea in abatement. An agent may even become liable on a contract contrary to his actual intention; but, if he contracts in such a form or under such circumstances as to make himself personally responsible, he cannot afterwards, whether his principal was or was not known at the time of the contract, relieve himself of that responsibility. 2 Clark & Skyles on Agency, § 566, and cases cited; 1 Min. Inst. 235–237; 3 Rob. Pr. (New) 54, and authorities cited.

Another objection made to the plea is that it "attempts to set off the claim of the partnership of Leterman & Wollberg against the individual demand of the plaintiff against the defendant."

Where a person enters into a simple contract, oral or in writing, other than a negotiable instrument, in his own name, when he is in fact acting as the agent of another and for his benefit, without disclosing his principal, the other party to the contract may, as a general rule, hold either the agent or his principal, when discovered, personally liable on the contract. But he cannot hold both. 1 Min. Inst. pp. 236, 237, and cases cited; 3 Rob. Pr. (New) 50, and cases cited; Clark & Skyles on Agency, §§ 457, 568.

It is also equally well settled that upon such a contract either the agent or the principal may sue; the defendant, where the principal sues upon it, being entitled to be placed in the same situation at the time of the disclosure of the real principal as if the agent had been the contracting party. National Bank v. Nolting, 94 Va. 263, 26 S. E. 826; 3 Rob. Pr. (New) 36, and cases cited; 1 Min. Inst. 239, and cases cited; Clark & Skyles on Law of Agency, § 614.

If the agent of the undisclosed principal be sued by the other party to the contract, the latter may recover such damages as have resulted from the breach of it on the agent's part. On the other hand, if such agent sues, he may recover such damages as have resulted by reason of the breach of the contract by the other party—unless his principal interferes in the suit; and he is entitled to recover the full measure of damages in the same manner as though the action had been brought by the principal. See Clark & Skyles on Agency, § 624; Mechem on

Agency, §§ 755, 763; Joseph v. Knox, 3 Camp. 320–322; Gardner v. Davis, 2 Car. & Payne, 49; United States Tel. Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519, 522, 523; Rhoades v. Blackiston, 106 Mass. 334, 8 Am. Rep. 332, 333, 334; 31 Cyc. 1564; Shelby v. Burrow, 76 Ark. 558, 89 S. W. 464, 1 L. R. A. (N. S.) 303, 6 Ann. Cas. 554, and note.[6]

There are exceptions to the general principles of law stated above; but they do not affect the question now under consideration, and need not, therefore, be mentioned.

Since either party to the contract set up in the special plea had the right to sue the other for its breach, if he failed to keep and perform it on his part, it follows that either, when sued by the other for its breach, had the right to set up as a defense, under section 3299 of the Code, any matter which would "entitle him either to recover damages at law from the plaintiff or the person under whom the plaintiff claims, or relief in equity, in whole or in part, against the obligation of the contract" sued on.

"The plain purpose of that section," as said by Judge Moncure in Huff v. Broyles, 26 Grat. 283, 285, "was to give precisely the same measure of relief on a plea filed under the same as could be obtained in an independent action brought for the same cause. * * *" See Am. Manganese Co. v. Va. Manganese Co., 91 Va. 272, 282, 21 S. E. 466; Columbia Accident Ass'n v. Rockey, 93 Va. 678, 25 S. E. 1009; Mangus v. McClelland, 93 Va. 786, 22 S. E. 364; Tyson v. Williamson, 96 Va. 636, 32 S. E. 42; Kinzie v. Riely, Ex'r, 100 Va. 709, 42 S. E. 872.

By section 3303 of the Code it is declared that a defendant who files a plea under section 3299 shall be deemed to have brought an action at the time of filing such plea.

The defendant having the right to set up in a special plea under section 3299 any damages which resulted from a breach of the contract which he could have recovered in an independent action, the fact that his recovery over, if any, was for the benefit of Leterman & Wollberg, furnished no ground of objection to the special plea; for it is settled that, if the agent of an undisclosed principal sues, it is no ground of defense that the beneficial interest is in another, or that the plaintiff, if he makes a recovery, will be bound to account to another. See Rhoades v. Blackiston, supra; United States Tel. Co. v. Gildersleve, supra; Joseph v. Knox, supra; Seaman v. Slater (C. C.) 49 Fed. 37; Clark & Skyles on Agency, § 619; Mechem on Agency, § 755.

The damages claimed in the special plea, as it avers, resulted from

[6] See also the leading case of Rhoades v. Blackiston, 106 Mass. 334, 8 Am. Rep. 332 (1871). Under the Code provision that "every action must be prosecuted in the name of the real party in interest," except that "a trustee of an express trust * * * may sue" in his own name, the agent who has contracted in his own name is held to be a trustee of an express trust. Considerant v. Brisbane, 22 N. Y. 389 (1860).

the failure on the part of the plaintiff to do the work, to recover the price of which he brought his action, in the manner and within the time provided by the contract, and the defendant had the right, under section 3299 of the Code, to set them up and to get the benefit of them in this action as fully as if he had instituted an independent action to recover them. No prejudice can result to the plaintiff from compelling him on his part to answer for not performing the contract to the agent, whom he is holding for its breach, instead of the principal. * * *

Reversed.

FISHER v. MARSH.

(Court of Queen's Bench, 1865. 6 Best & S. 411, 11 Jur. N. S. 795, 34 L. J. Q. B. 177, 12 L. T. Rep. [N. S.] 604, 13 W. R. 834, 118 E. C. L. 411.)

Declaration for £27. for the lease of land by plaintiff by auction on the occasion of the Oxford races. Plea, never indebted.

BLACKBURN, J.[1] I am of opinion that the nonsuit should be set aside, and the rule for a new trial made absolute. I think there was a case to go to the jury that the plaintiff was entitled to maintain the action. * * *

The ground of the nonsuit was that, although there was a letting and occupation under it, the plaintiff was not the proper person to sue; for notwithstanding the defendant had made himself liable to the plaintiff's employers, yet unless he was liable to pay the plaintiff the writ was sued out in the wrong name. But I think there was evidence of a contract with the plaintiff personally. The plaintiff was indeed acting as auctioneer and was known to be such; and this would be evidence that some other person employed him, and that he had no interest in the land beyond that of letting it to the highest bidder. The general rule is, that when an agent makes a contract, naming his principal, the contract is made with the principal and not with the agent. But even where the principal is known a contract in writing may be made by an agent with a third person in such terms that he is personally bound to the fulfilment of it; as if he says, "I for my own self contract," in such a case there is a personal contract by the agent, and he may sue or be sued on it, although the principal may interfere and claim the benefit of it, as was decided in Higgins v. Senior, 8 M. & W. 834, where the cases are collected. In the present case the plaintiff on putting up this land for hire in effect said, "I let the land; and I undertake upon the price being paid to me that the person taking the land shall have the enjoyment of it." Then the defendant having bid for it, and being the highest bidder, there is a clear contract by the defendant to become tenant. The terms of the contract were not reduced to writing; but does the fact of the plaintiff being auctioneer prevent the contract being with him? If not, there was

[1] Part of the opinion is omitted.

evidence to go to the jury. There are reasons in the present case why the plaintiff should enter into the contract, making himself personally liable; there are also reasons why he should not: but here was evidence on which the jury might say that he had done so, unless the fact of the plaintiff being auctioneer is conclusive to the contrary. In Franklyn v. Lamond, 4 C. B. 637 (E. C. L. R. vol. 56), the plaintiff had bought railway shares at an auction under circumstances much like those in the present case, and in an action against the auctioneers, who had not disclosed their principal at the time of the sale, for not transferring the shares, the Court held the proper inference to be that the contract was with the auctioneer personally. That is a distinct authority that in the present case there was evidence of a contract with the plaintiff personally.[8]

Next, there being such a contract, and the defendant having been let into possession under it, may the rent be recovered in an action for use and occupation? The plaintiff having let the defendant into possession under the contract, the defendant would be estopped from denying the title if it were requisite that it should be proved, and the case therefore turns upon the contract for use and occupation. In Evans v. Evans, 3 A. & E. 132 (E. C. L. R. vol. 30), the auctioneers in effect said that they were selling for David Jones, whose name appeared on the conditions of sale as approving them. Now, primâ facie, when an agent makes a contract for a person named, the principal and not the agent is considered as making the contract; nevertheless a case was set up on behalf of the plaintiffs that the auctioneers were the proper parties to sue, because the contract was made with them, and they had an interest in the premises as creditors of their principal. The Judge had told the jury that the contract was with the auctioneers. The Court thought that direction was not correct with reference to the conditions of sale, the construction of which was for them; not that there was no evidence to support an action for use and occupation by the plaintiffs. And they granted a new trial on the question of fact, which was for the jury, viz., "By whose permission did the occupation take place, and by whom was the contract made?" That appears from the judgments of Patteson and Coleridge, JJ. Here the question is solely whether there was a case to go to the jury that the plaintiff had made the contract personally, and for the reasons which I have expressed I think there was.[9]

[8] The rule extends to all contracts made in the name of the agent, whether the principal is known or unknown, Edwards v. Ezell, 2 Willson, Civ. Cas. Ct. App. § 276 (1884); Carter v. So. Ry. Co., 111 Ga. 38, 26 S. E. 308, 50 L. R. A. 354 (1900), especially if the agent has a beneficial interest in the contract, Whitehead v. Potter, 26 N. C. 257 (1844). Cf. Evrit v. Bancroft, 22 Ohio St. 172 (1871), in which the interest of the agent was not in the contract, but in the commissions he expected to earn if the contract was made. Neal v. Andrews (Tex. Civ. App.) 60 S. W. 459 (1900).

[9] The opinions of Mellor and Shee, JJ., are omitted.

SHORT v. SPACKMAN.

(Court of King's Bench, 1831. 2 Barn. & Adol. 962, 22 E. C. L. 402.)

Assumpsit for not delivering goods. At the trial before Lord Tenterden, C. J., at the sittings in London after Trinity term 1831, a verdict was found for the plaintiffs for £600. subject to a reference. The arbitrator made his award, and annexed to it, at the request of the defendant's counsel, a statement to the following effect: The plaintiffs being brokers, and authorized by one Hudson to buy for him twenty tuns of Greenland whale oil, employed Bentley, an oil broker, to make such purchase for them. Bentley applied to the defendant to sell that quantity to the plaintiffs. The defendant at first refused to sell to the plaintiffs; but, upon being informed by Bentley that they were purchasing not for themselves, but as brokers for unnamed principals, he agreed to sell to them; and bought and sold notes, signed by Bentley, were sent by him to the plaintiffs and defendant, in which the goods were stated to be "Bought for Messrs. Short, Brown, and Bowyer" (the plaintiffs), "of Mr. W. F. Spackman" (the defendant), on the terms therein specified to be paid for by the buyers in ready money. The plaintiffs sent a corresponding bought note to Hudson, their principal; and they afterwards, under a general authority from him, sold the goods for his account, through another broker, to Messrs. Buck & Co. The bought and sold notes in this transaction mentioned the plaintiffs and Buck & Co., as the buying and selling parties. On this sale being communicated to Hudson, he returned the sold note, which had been sent to him, declaring that he would have nothing to do with the oil as purchaser or seller; and to this the plaintiffs assented. The defendant afterwards refused to deliver the oil in pursuance of his agreement, and the plaintiffs, being unable to fulfill their engagement with Buck & Co., were obliged to pay them a sum of money in satisfaction, the market having risen since the last-mentioned contract. It was contended, on behalf of the defendant, that Hudson's repudiation of the contract, and the acquiescence of the plaintiffs therein, put an end to the engagement between the plaintiffs and defendant. The arbitrator, however, was of opinion that these facts did not affect either the rights of the defendant as against Hudson, or the rights and liabilities of the plaintiffs and defendant. He therefore awarded that the defendant should pay the plaintiffs the amount of the loss sustained by them in their settlement with Buck & Co. A rule nisi was obtained this term for setting aside the award, on the ground that the action was not maintainable upon the facts above stated.

Lord TENTERDEN, C. J. I had at first some difficulty in coming to the conclusion that the plaintiffs, situated as they were in this case, could sue upon the contract for their own benefit. But on looking to the contract itself, there appears nothing to prevent it. The form of

the bought note is, "Bought for Messrs. Short, Brown, and Bowyer," twenty tuns of Greenland oil, at so much per ton, to be paid for by the buyers in ready money. The sold note is in the like form. In both the plaintiffs appear as the principals. The rest of the facts are dehors the present question. The rule will therefore be discharged.

PARKE, J. There was no fraud upon the defendant in this case. He was informed that there was an unknown principal, and such was the fact. It is found that the plaintiffs were authorized by Hudson to buy the oil of the defendant, and the contract was binding both on them, and, if the defendant chose to enforce it, on Hudson. Then it is said the contract was put an end to by what is called the repudiation on Hudson's part: that is, by his informing the plaintiffs that he would have nothing more to do with the purchase or sale, and by their acquiescing in such determination. But this is no more, in effect, than if Hudson had thought proper to sell the benefit of his contract to any other person, which he might have done without the consent of the plaintiffs: and his doing so would have been nothing to the defendant.[10] It clearly would not have determined the contract. I think, therefore, that the arbitrator came to a right conclusion.[11]

STEVENSON v. MORTIMER.

(Court of King's Bench, 1778. Cowper, 805.)

Action for money had and received, brought by plaintiffs, as owners of a boat carrying chalk and lime, against defendant, as a custom house officer, for excessive fees collected by defendant from the master of the boat.

Lord MANSFIELD delivered his opinion as follows.—The ground of the nonsuit at the trial was, that this action could not be well maintained by the plaintiffs, who are the *owners* of the vessel in question; but it ought to have been brought by the *master,* who actually paid the money. That ground, therefore, makes now the only question before us: As to which, there is not a particle of doubt. Qui facit per alium, facit per se. Where a man pays money by his *agent,* which ought not to have been paid, either the agent, or principal, may bring an action to recover it back. The agent may, from the authority of the principal; and the principal may, as proving it to have been paid by his agent. If money is paid to a known agent, and an action brought against him for it, it is an answer to such action, that he has paid it over to his principal. Sadler v. Evans, 4 Bur. 1984, ante, p. 685. Here the statute lays the burthen on the *master* from necessity; and makes

[10] As to the right of every man to elect with what parties he will deal, and its effect on the right of the agent or principal to sue, see post, p. 794.

[11] The opinions of Taunton and Patteson, JJ., are omitted.

him personally liable to penalties if he neglects to perform the requisitions of it. But still he is entitled to charge the necessary fees, &c. upon his doing so, to the *account* of *his owners*. And in this case, there can be no doubt of the relation in which the master stood to the plaintiffs; for he is the *witness*, and he swears, that the money was *paid* by the *order* of the *plaintiffs*. Therefore, they are very well warranted to maintain the action.—If the parties had gone to trial upon an apprehension that the only question to be tried was, Whether this was a case within the act of parliament, consequently, whether any fee was due; the plaintiff could not have been permitted to surprise the defendant at the trial, by starting another ground, upon which to recover a Norfolk *groat*. An action for money had and received is governed by the most liberal equity. Neither party is allowed to entrap the other in *form*. But here, the plaintiff gave *notice*, that he meant to insist that too much was taken; and therefore, both came to the trial with equal knowledge of the matter in dispute. Therefore, the rule for a new trial must be absolute.—Lord MANSFIELD added, that he thought, the plaintiffs ought to let the defendant know the amount of the excess which they claimed; that the defendant might have an opportunity of paying money into court; and the rule was drawn up accordingly.

KENT v. BORNSTEIN.[12]

(Supreme Judicial Court of Massachusetts, 1866. 12 Allen, 342.)

Contract to recover back $50, paid by plaintiff to defendant in change for a $50 counterfeit bill. Judgment for plaintiff and defendant alleged exceptions.

BIGELOW, C. J.[13] The facts of this case do not bring it within the familiar principle relied on by the defendant, that a mere agent or servant, with whom a contract, either express or implied, is entered into in behalf of another, and who has no beneficial interest in the transaction, cannot support an action thereon. The plaintiff had possession of money belonging to another, for a special purpose only. His authority was strictly limited. It was confined to the making of sales of goods in the store and the payment of the money received therefor to a third person. He had no authority to deal with the money as his own, or to appropriate it for any purpose whatever. His duty was merely to receive it for goods which he might sell in the course of the day, and to hold it in his possession till the hour for the daily payment of it over to the sheriff's keeper arrived, when he was bound

[12] Accord: Holt v. Ely, 1 E. & B. 795, 17 Jur. 892, 72 E. C. L. 795 (1853). In the absence of mistake or fraud the agent cannot set up his want of authority in an action against the third person. Yetter v. Van Patten, 103 Ill. App. 59 (1902). The third person is not accountable for the agent's fault. Winkley v. Foye, 28 N. H. 513 (1854).

[13] Part of the opinion is omitted.

to pay it over to him. Any act or dealing with the money beyond this was outside of the scope of his employment. He had no authority to enter into any contract concerning the money in his hands, or to exchange it for other money with third persons. An authority to receive the proceeds of sales in a shop did not empower the plaintiff to exchange the money received in small sums for bills of larger denominations with persons who made no purchases of goods. No evidence was offered to show any usage of business, either general or special, which would authorize the inference that the plaintiff's authority was extended beyond the precise terms of his employment, so as to embrace a transaction similar to that which he entered into with the defendant's agent.

In this state of the evidence, it is clear that the plaintiff exceeded his authority in exchanging the smaller bills in his possession for one of the denomination of fifty dollars, and he is liable to his employer for the loss occasioned by his unauthorized act. It does not appear that the transaction has been ratified by the principal. For aught that we can know, the plaintiff is still liable for the amount of the genuine bills which he exchanged for the counterfeit one. It cannot therefore be said that the plaintiff has no beneficial interest in the cause of action on which this suit is brought. On the contrary, it plainly appears that his right to recover in this action is the only mode in which he can indemnify himself against the rightful claim of his employer for the loss caused by his abuse of the authority intrusted to him. * * *

Exceptions overruled.

SCHAEFER v. HENKEL.

(Court of Appeals of New York, 1878. 75 N. Y. 378, 7 Abb. N. C. 1, 57 How. Prac. 97.)

Action upon a lease under seal executed by "J. Romaine Brown, Agent," as lessor, and by defendant as lessee.

MILLER, J.[14] The plaintiffs were not parties to the lease upon which this action was brought. It was not signed by them. Their names did not appear in it, and there was nothing in the lease to show that they had any thing to do with or any interest in the demised premises or the execution of the lease, or that it was executed in their behalf. It was made by one Brown, as lessor, who is described therein, and who signed it as agent; but it is not stated in the lease for whom he acted. The covenants are all between "J. Romaine Brown, agent, the party of the first part," and the defendant, as party of the second part; and it is not made to appear that the defendant had any knowledge or intimation whatever that Brown was acting on the behalf of the plaintiffs or for their benefit. For whom Brown was agent

[14] Part of the opinion is omitted.

was not made known to the defendant, and it only appears by parol proof upon the trial that Brown was authorized orally by the plaintiffs to make a demise of the premises described in the lease. The signature of Brown is as agent, and his seal is attached to the instrument, and the same is also signed and sealed by the defendant. The plaintiffs, without any assignment of Brown's interest under the lease, bring this action to recover the rent unpaid, upon the ground that Brown merely acted as their agent by their authority, and that they are the actual parties in interest. The question to be determined is whether the actual owners of the lease, which is in the nature of a deed inter partes, which was not and does not on its face show that it was executed by them, but which does show an execution by a third person, claiming to act as agent without disclosing the name of his principal, and which contains covenants between the parties actually signing and sealing the same, can maintain an action upon it for the rent reserved therein, even although the person who executed the same, describing himself "agent and party of the first part," had oral authority to enter into the contract, and acted as the owner's agent in the transaction.

The rule seems to be quite well established that in general an action upon a sealed instrument of this description must be brought by and in the name of a person who is a party to such instrument, and that a third person or a stranger to the instrument cannot maintain an action upon the same. The question presented has been the subject of frequent consideration in the courts, and I think it is established in this state that where it distinctly appears from the instrument executed that the seal affixed is the seal of the person subscribing, who designates himself as agent, and not the seal of the principal, that the former only is the real party who can maintain an action on the same. He alone enters into the covenants and is liable for any failure to fulfill, and he only can prosecute the other party. He is named in the indenture as a party, and an action will not lie on behalf of or against any person who is not a party to the instrument, or who does not lawfully represent or occupy the place of such party. It is unnecessary to review all the decisions bearing upon the question, as in a very recent case the principle discussed has been considered by this court, and the whole subject, as well as the decisions relating to the same, deliberately and carefully reviewed. See Briggs v. Partridge, 64 N. Y. 357, 21 Am. Rep. 617. In the case cited an action was brought to recover purchase-money unpaid upon a contract for the sale and purchase of lands. The complaint alleged that the plaintiffs entered into an agreement in writing with one Hurlburd, who was acting under the authority of the defendants, whereby the plaintiffs sold and the defendants through Hurlburd bought a certain described piece of land, for a price named, which price the defendants, through their agent, Hurlburd, agreed to pay, as specified. The agreement was in writing, but did not show that Partridge was a principal party, and was signed and sealed

by Hurlburd individually. The name of Partridge did not appear in the instrument, but the plaintiffs offered to prove that Hurlburd was acting solely for and under the direction of Partridge, who made or caused the first payment to be made as Partridge's agent or trustee in the transaction, and that his authority was oral. Proof was also offered to show that Hurlburd was constituted such agent by parol; and that the plaintiffs did not know that Partridge was the real principal. The complaint was dismissed, and it was held by this court that a contract of this description under seal could not be enforced as the simple contract of another not mentioned in or a party to the instrument, on proof that the vendee named had oral authority from such other to enter into the contract, and acted as agent in the transaction; at least, in the absence of proof of some act of ratification on the part of the undisclosed principal. The opinion of Andrews, J., in the case cited, fully covers the question now presented; and it appears to be unnecessary to review or examine the prior cases which have a bearing upon the subject. Unless some distinction of a vital character exists between that case and the one now to be determined, the former must be regarded as decisive of the case at bar.

The claim of the learned counsel for the appellant, that as the contract in case of a lease is not required to be under seal, it may be regarded as a simple contract, upon which the principal may sue or be sued in his own name, and the seal may be rejected as surplusage, is also considered in the opinion in the case cited; and without indorsing the correctness of the cases relied upon, it is remarked that these are cases which hold this doctrine; "but the principal's interest in the contract appears upon its face, and he has received the benefit of performance by the other party, and has ratified and confirmed it by acts in pais." It is therefore settled law, that in order to take a case out of the general rule, where the contract is one which is valid without a seal, and the seal is therefore of no account, it must appear that the contract was really made on behalf of the principal, from the instrument, and that the party derived benefit from and accepted and confirmed it by acts on his part. Within this rule, it remains to be considered whether the case at bar differs from that cited. An attempted distinction is sought to be maintained, for the reason that in the case cited, Hurlburd, the agent, did not enter into the agreement to sell as *agent,* while here Brown signs as agent, which, it is claimed, is notice of the capacity in which he contracts. This we think is not sufficient; and to establish any real distinction it should appear for whom he was agent, and that the parties claiming were his principals. The plaintiffs not being named in the lease, and it not appearing that they had any interest therein, there is no more ground for claiming that Brown was their agent than that he was the agent of some stranger. The use of the word *"agent"* has but little significance of itself, and as the principals are not named, cannot be regarded as applying more to one per-

son than to another. It did not take away from Brown's obligation, because he is named as agent. The covenants are between the parties who are only named in the instrument and no other parties. Any other interpretation would be a contravention of its obvious import. As was said in the case cited, "We find *no* authority for the proposition that a contract *under seal* may be turned into the *simple contract* of a party not in any way appearing on its face to be a party to or interested in it, on proof dehors the instrument, that the nominal party was acting as the agent of another." To render the principal liable, where there is a contract by deed, made by an attorney or agent, it must be made in the name of the principal. Huntington v. Knox, 7 Cush. 374, cited and approved in Briggs v. Partridge, supra. It would be going very far to hold that a distinction so trifling and unimportant would authorize a disregard of the decision cited, and thus virtually establish a new and different principle than one which has been settled thereby. * * *

RAPALLO and ALLEN, JJ., dissent. Judgment affirmed.

NEFF v. BADEN.

(Court of Appeals of Kentucky, 1843. 3 B. Mon. 468.)

BRECK, J. Neff executed his obligation under seal, to James Speed, lawful agent of Baden, in which it is recited that Speed, as the lawful agent of Baden, leased to Neff, for the term of ten years, a lot in the city of Louisville, and covenanted, as the agent of Baden, to keep him in possession. Neff covenanted to pay Speed as agent, seventy-five dollars per year, rent, payable one half semi-annually. The covenant is signed by Neff alone.

Upon that covenant, Baden has brought this action of covenant, and assigned as a breach, the failure of Neff to pay one year's rent, which had become due. The defendant demurred—the demurrer was overruled, and judgment against him, to which he prosecutes this writ of error.

The only question for consideration is, whether the action can be maintained in the name of Baden.

The covenant is expressed to pay Speed, and we are clearly of opinion the action cannot be sustained in the name of Baden.

The numerous authorities referred to have been examined, but we think, do not sustain the action.

The judgment is therefore reversed, and cause remanded, that the defendant's demurrer may be sustained, and judgment thereon rendered for defendant.[15]

[15] Cf. Potts v. Rider, 3 Ohio, 70, 17 Am. Dec. 581 (1827), in which the agent sued on a covenant in his name, and Tharp v. Farquar, 6 B. Mon. 3 (1845), in which the court sustained a demurrer to an action by an agent on a covenant.

MORRIS v. CLEASBY.

(Court of King's Bench, 1813. 1 Maule & S. 576.)

Declaration: In consideration that the bankrupts would deliver to the defendant goods to be sold on account of the bankrupts, the defendant undertook to sell them, and to render a true and just account of the sale, and of the monies arising therefrom. Breach; that the defendant hath not rendered to the bankrupts, or to the plaintiffs as aforesaid, a just and true account of the sale, or of the monies arising. Second count, that the bankrupts had delivered goods to the defendant to be sold, but the defendant had not rendered a just account of the said goods. Third count, for not rendering a just account after the receipt of the monies arising from the sale. Fourth count, for not rendering a just account of the goods after the sale thereof. There were also the money counts, and an account stated. Plea, non-assumpsit, with notice of set-off.

At the trial before Lord Ellenborough, C. J., at the London sittings after Hilary term, it appeared in evidence that on the 23rd October 1810, the bankrupts ordered the defendant (a broker) to purchase for them, at his public sale, a quantity of spirit of turpentine for exportation. The defendant accordingly made the purchase for £1090. 7s. 4d., which was agreed to be paid for in bills at 2 months. The defendant did not mention to the bankrupts at the time of the purchase the name of the seller, nor did it appear in the bill of parcels, nor did the defendant deliver any written paper containing the name; but in fact the goods belonged to Le Mesurier & Co., and were sold by the defendant as their broker acting under a del credere commission; but the bankrupts never authorized him to guaranty their house to Le Mesurier & Co., or ever knew that he had so done. Soon after the purchase the bankrupts gave the defendant directions to ship the goods, who then for the first time informed them that Le Mesurier & Co. were the proprietors, and referred the bankrupts to them to get the necessary documents for shipping the goods; after which, the defendant paid Le Mesurier & Co. the price of the turpentine; but the precise time when he made this payment did not appear. The bankrupts having had several interviews with Le Mesurier, and difficulties having occurred in procuring the shipment, abandoned their resolution of shipping, and directed the defendant to re-sell the goods; who accordingly re-sold them at different periods, the first of which was on the 27th November, and the last on the 31st of December, 1810. The produce of the re-sales was £683. 4s. 5d. Before the time stipulated for the payment of the turpentine the bankrupts became embarrassed, and on the 10th of January, 1811, stopped payment. The question was, whether the defendant was entitled to take credit in his account with the assignees of Smith & Co. for the price of the turpentines so paid to Le Mesurier & Co. His Lordship stated the rule to the jury

to be this, that a factor represents his principal until the principal is disclosed, but when that is done, his character of factor is at an end, and the principal becomes the person to be dealt with. Until that time payments may be made by the factor, and be the subject of set-off by him in his account with the principal. The jury found a verdict for the plaintiff, without allowing the set-off, and in Easter term a rule nisi for a new trial having been obtained.

Lord ELLENBOROUGH, C. J. In this case I have not seen, nor am likely to see, any thing to induce me to alter my opinion as to the right of the broker to receive payment until his principal appears. The moment however the principal does appear, provided it be before payment, he comes into his full rights to receive it; that is a rule for the protection of the principal. But yet if the principal authorize his agent to receive payment, such payment will be good against him. So under these circumstances if Cleasby had received payment, it would have been good; for to this extent we must give effect to the del credere commission, that it authorized him to receive payment, his principal not having countermanded such authority. The only point on which the question for a new trial is to be considered, is how far there was a right of set-off or mutual credit as it regards the broker. If a broker continued the presumptive principal, unquestionably every right of set-off belonged to him which belonged to his principal, but when once the principal is disclosed, the right of set-off no longer continues. The question then must stand on the mutual credit. I wish to have it better ascertained, whether this be considered as a right of set-off or of mutual credit, when the disclosure of the principal took place.[16] Rule absolute.

HOLDEN v. RUTLAND R. CO.

(Supreme Court of Vermont, 1901. 73 Vt. 317, 50 Atl. 1096.)

Case for negligence in the sale of a mileage book. Plea not guilty. Judgment for defendant in a directed verdict.

WATSON, J.[17] The mileage book in question was purchased of the defendant's ticket agent at Burlington by the plaintiff, as the agent of Dana O. Coles, but the plaintiff did not make known his agency nor disclose his principal. In selling such tickets, the purchaser's name is required to be signed to the contract printed in the back part of the book. The plaintiff, being requested by the ticket agent thus to sign the book in question, signed his own name thereto, instead of that of his principal. By force of the contract it is the duty of the selling agent to enter the purchaser's name in the front part of the book as the person to whom the ticket is issued and entitled to transportation thereon. In the place for so doing the selling agent en-

[16] The opinions of Le Blanc and Bayley, JJ., are omitted.

[17] Part of the opinion is omitted.

tered the name of "A. F. Holden," instead of "D. F. Holden," the plaintiff's name signed in the back part of the book as the purchaser. The ticket was then used by the plaintiff in going from Burlington to Rutland and return. Upon his return he gave the book to Coles, and paid him for the number of miles used. About two months afterwards, the plaintiff hired the book of Coles, and, with his daughter, attempted to go from Burlington to Rutland on another journey. The daughter's name had then been inserted in the front part of the book by Coles as a member of the purchaser's family, and a person entitled to transportation thereon. In making this journey over the defendant's road, the plaintiff offered the book for the transportation of himself and daughter, but the conductor refused to accept it, and they rode without paying fare to Rutland, where the plaintiff was arrested at the request of the conductor, and detained for some little time before being released. The plaintiff claims that his name should have been entered in the front part of the book as the person to whom the ticket was issued, and that to enter the name of "A. F. Holden" instead was negligence by the ticket agent; and, further, that the damages suffered by the plaintiff by reason of the conductor's refusal to accept the book for transportation were the result of this negligence, for which the defendant is liable. The court below ordered a verdict for the defendant, to which the plaintiff excepted. Was this error? is the sole question.

The plaintiff purchased the mileage book for Coles, and as his agent, but he neither disclosed his agency nor his principal. In these circumstances it is a well-settled rule of law that an action for a breach of contract not under seal may be brought in the name of either the agent or the principal,—in the name of the agent because he has been treated by the defendant as the other party to the contract; in the name of the principal because he is the person really interested in the contract, for whose benefit it was made, and with whom it is considered in law as made. Dicey, Parties, 136; Sims v. Bond, 5 Barn. & Adol. 393; Lapham v. Green, 9 Vt. 407. But that this rule of law shall not be so exercised as to work an injustice to the other party to the contract, other rules incident thereto are equally well established. One of these is that, if the action is brought by the agent in his own name, the defendant may avail himself of those defenses which are good against the agent who is the plaintiff on record; also of any defense that would be good against the principal in whose interest the action is brought. Dicey, Parties, 142; 2 Smith, Lead. Cas. 428. * * *

When the plaintiff hired the book to make the journey in question, he informed Coles that his daughter was going with him, whereupon her name was inserted in the book, as before stated. Assuming that her name might properly have been there inserted as a member of the purchaser's family, thereby entitling her to transportation upon the ticket, under the provisions of the contract it could be done only

by the ticket agent at the station where the ticket was sold. Neither the plaintiff nor Coles had any right so to insert it. * * *

This defense being available in an action brought by the agent in his own name, the verdict was properly ordered. Let judgment be affirmed.[18]

SECTION 2.—IN TORT

FAULKNER v. BROWN.

(Supreme Court of Judicature of New York, 1834. 13 Wend. 63.)

Error from the Schenectady common pleas. Faulkner had in his possession a quantity of leather, belonging to one Van Slyck, who had left the same with him, and requested him to take care of it. It was stolen from the possession of Faulkner, and sold by the thief to Brown. Faulkner demanded the leather of Brown, and on his refusal to deliver it up, brought an action of *trover* against him in a justice's court. The justice being of opinion that Faulkner was not entitled to maintain an action for the leather in his own name, rendered judgment against him for costs. The common pleas of Schenectady affirmed the judgment on *certiorari*, and the plaintiff sued out a writ of error.

SAVAGE, C. J. Both courts were clearly wrong. To maintain *trover*, the plaintiff must have the *general* or *special* property. The plaintiff here had a special property in the leather; Van Slyck had the general property. The action may, in most cases, be brought either by the general or special owner of the goods for a conversion by a stranger, and judgment obtained by one is a good bar to the action of the other. 2 Saund. 47, e. Possession under the rightful owner is sufficient against a person having no color of right. An agister, a carrier, a factor, may bring trover; even a general bailment will suffice without being made for any special purpose, but only for the benefit of the rightful owner. Here is a general bailment. It would be monstrously inconvenient if a wrongdoer could come and take things out of the possession of him who had the possession under the rightful owner. Sutton v. Buck, 2 Taunt. 309, per Chambre, Justice. Though a mere servant has not such a special property as will enable him to maintain trover, yet a bailee, or trustee, or any

[18] See, also, Rosser v. Darden, 82 Ga. 219, 7 S. E. 919, 14 Am. St. Rep. 152 (1888), in which the principal and agent agreed to keep the agency secret. Balto. Coal Tar Co. v. Fletcher, 61 Md. 288 (1884); Saladin v. Mitchell, 45 Ill. 79 (1867), in which part payment was made to the agent before the principal was disclosed; Brown v. Morris, 83 N. C. 251 (1880), where the third person paid the agent under a misapprehension not induced by the principal, and then set up this payment by way of counterclaim; and Girard v. Taggart, 5 Serg. & R. 19, 9 Am. Dec. 327 (1818).

other person who is responsible to his principal, may maintain the action, and the lawful possession of the goods is prima facie evidence of property. Dyer v. Vandenbergh, 11 Johns. 149, n. 2 Saund. 47; 1 East, 244; 4 East, 214; 1 Salk. 290; Cro. Eliz. 819; Hotchkiss v. McVickar, 12 Johns. 407, per Spencer, J. The defendant may, undoubtedly, show a paramount title in a third person, Schermerhorn v. Van Volkenburgh, 11 Johns. 529, but in this case the plaintiff is the bailee of the general owner. Numerous other cases might be cited, but they are unnecessary.

Judgment reversed.

PORTER v. SCHENDEL.[19]

(Supreme Court of New York, Appellate Term, 1899. 25 Misc. Rep. 779, 55 N. Y. Supp. 602.)

PER CURIAM. We have carefully examined the evidence in this case, and have come to the conclusion that there was sufficient, if credited, to sustain a finding that the injury to property complained of was caused by the negligence of the defendant. It was peculiarly the province of the court below to determine what credit should be given to the witnesses on the trial, and we see no reason for reviewing his judgment on this question.

We are further satisfied that, although the plaintiffs were not the general owners of the goods which were injured, it was competent for them to recover the damages so suffered, in an action instituted by them in their own names. They were factors, having possession of the goods in question for sale, and, by special agreement, were guarantors of the purchase money on sales made by them. They were also bound to incur certain expenditures, for which they were entitled to be reimbursed, and they were also to receive an agreed commission on such sales. There was some evidence in the case tending to show that, at the time of the injury complained of, the consignors or general owners of the property were indebted to them on open account with respect to these matters. For the amount so due the plaintiffs undoubtedly had a lien on the goods in their hands. Story, Ag. § 34. They had, therefore, a special property therein, coupled with the possession of the goods, sufficient to support their right to institute such an action as this; and the recovery of the judgment here will be a bar to any action which might hereafter be brought by the general owner, to whom it is the duty of the plaintiffs to account for the amount realized by them in this action. 1 Am.

[19] Accord: Williams v. Millington, 1 H. Bl. 81 (1788). The agent in possession of property may maintain trespass against a wrongdoer. Taylor v. Hayes, 63 Vt. 475, 21 Atl. 610 (1891). But see Galveston, H. & S. A. Ry. Co. v. Stockton, 15 Tex. Civ. App. 145, 38 S. W. 647 (1897), which holds that, if plaintiff by his own pleadings or evidence shows that he holds as agent, the action must be in the name of the principal.

& Eng. Enc. Law (2d Ed.) p. 1166; Faulkner v. Brown, 13 Wend. 63; Gorum v. Carey, 1 Abb. Prac. 285; Mechanics' & Traders' Bank v. Farmers' & Mechanics' Nat. Bank, 60 N. Y. 40, 52.

The judgment in favor of the plaintiff must be affirmed. Judgment affirmed, with costs.

MORAN v. DUNPHY.

(Supreme Judicial Court of Massachusetts, 1901. 177 Mass. 485, 59 N. E. 125, 52 L. R. A. 115, 83 Am. St. Rep. 289.)

Tort on two counts, first, that defendant, with intent to injure plaintiff and induce and instigate his employer to discharge him, did maliciously, willfully and wrongfully, by certain slanderous charges, induce and instigate the said employer to discharge plaintiff; second, that defendant, with intent to injure plaintiff and to induce the said employer to discharge him, did maliciously and wrongfully induce said employer to discharge him, etc. The case came up on appeal from a judgment sustaining defendant's demurrer.

HOLMES, C. J. The first count of the declaration in this case substantially follows the form held bad in May v. Wood, 172 Mass. 11, 51 N. E. 191, and Rice v. Albee, 164 Mass. 88, 41 N. E. 122, and the plaintiff's argument is directed to getting those cases overruled. It appears in the Reports that the later decision did not command the assent of all of us, and it is quite possible, at least, that if the question came up now for the first time the majority might be found to be on the side which did not prevail. Van Horn v. Van Horn, 56 N. J. Law, 318, 319, 28 Atl. 669. But it is not desirable that decisions should oscillate with changes in the bench, and we accept what was decided as the law. Still we deem it proper to call attention to the fact that the cases cited go only to a point of pleading. What they decide, so far as they bear on the present case, is merely that the substance of false statements by which a defendant is alleged to have induced a third person to break or end his contract must be set out. That we accept. But in view of the series of decisions by this court, from Walker v. Cronin, 107 Mass. 555, through Morasse v. Brochu, 151 Mass. 567, 25 N. E. 74, 8 L. R. A. 524, 121 Am. St. Rep. 474; Tasker v. Stanley, 153 Mass. 148, 26 N. E. 417, 10 L. R. A. 468; Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077, 32 L. R. A. 722, 57 Am. St. Rep. 443; Hartnett v. Association, 169 Mass. 229, 47 N. E. 1002, 38 L. R. A. 194; and Weston v. Barnicoat, 175 Mass. 454, 56 N. E. 619, 49 L. R. A. 612—to Plant v. Woods, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330, we cannot admit a doubt that maliciously and without justifiable cause to induce a third person to end his employment of the plaintiff, whether the inducement be false slanders or successful persuasion, is an actionable

tort. See, also, Angle v. Railway, 151 U. S. 1, 13, 14 Sup. Ct. 240, 38 L. Ed. 55.

We apprehend that there no longer is any difficulty in recognizing that a right to be protected from malicious interference may be incident to a right arising out of a contract, although a contract, so far as performance is concerned, imposes a duty only on the promisor. Again, in the case of a contract of employment, even when the employment is at will, the fact that the employer is free from liability for discharging the plaintiff does not carry with it immunity to the defendant who has controlled the employer's action to the plaintiff's harm. The notion that the employer's immunity must be a nonconductor, so far as any remoter liability was concerned, troubled some of the judges in Allen v. Flood [1898] App. Cas. 1, but is disposed of for this commonwealth by the cases cited.[20] See, also, May v. Wood, 172 Mass. 11, 14, 15, 51 N. E. 191. So, again, it may be taken to be settled by Plant v. Woods, 176 Mass. 492, 501, 502, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330, that motives may

[20] The principle of liability in such cases is thus stated by Brett, L. J., in Bowen v. Hall, 6 Q. B. D. 333, 45 J. P. 373, 50 L. J. Q. B. 305, 44 L. T. Rep. N. S. 75, 29 W. R. 367 (1881) (quoted with approval in Chipley v. Atkinson, 23 Fla. 206, 1 South. 934, 11 Am. St. Rep. 367 [1887]): "Wherever a man does an act which in fact and in law is a wrongful act, and such an act as may as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such injury, an action on the case will lie. That if these conditions are satisfied the action does not the less lie because the natural and probable consequence of the act complained of is an act done by a third person, or because such act so done by a third person is a breach of duty or contract by him, or an act illegal on his part, or an act otherwise imposing an actionable liability on him. That though it has been said the law implies that the act of the third party, being one which he has free will and power to do or not to do, is his own wilful act, and therefore is not the natural and probable result of the defendant's act, and though this may be so in many cases, yet if the law were so to imply in every case it would be an implication contrary to manifest truth and fact. That though it has been said that if the act of the third person is a breach of duty or contract, or is an act which is illegal for him to do, the law will not recognize that it is a natural or probable consequence of the defendant's act; yet, if this were so held in all cases the law would, in some instances, refuse to recognize what manifestly is true in fact. * * * That merely to persuade a person to break his contract may not be wrongful in law or fact, still, if the persuasion be used for the indirect purpose of injuring the plaintiff or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which in law and in fact is a wrongful act, and therefore an actionable act, if injury issues from it. * * * That it cannot be maintained that the breach of contract is not a natural and probable consequence of the act of persuading the third person to break his contract; the breach is not only the natural and probable consequence but by the terms of the proposition which involves the success of the persuasion, it is the actual consequence."

The same rule has been extended to a libel which injured the agent's business. Weiss v. Whittemore, 28 Mich. 366. No liability attaches if the act of the third person was one he had a legal right to do, whatever the motive, and whatever the effect on the agent. Raycroft v. Tayntor, 68 Vt. 219, 35 Atl. 53, 33 L. R. A. 225, 54 Am. St. Rep. 882. As to the rule in England, see the leading case of Allen v. Flood [1898] A. C. 1, 77 L. T. Rep. N. S. 717, 67 L. J. Q. B. 119, 14 T. L. Rep. 125, 46 W. R. 258, and the discussion of the same in 1 Mich. Law Rev. 28.

determine the question of liability; that, while intentional interference of the kind supposed may be privileged if for certain purposes, yet, if due only to malevolence, it must be answered for. On that point the judges were of one mind. See 176 Mass. 504, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330. Finally, we see no sound distinction between persuading by malevolent advice and accomplishing the same result by falsehood or putting in fear. In all cases the employer is controlled through motives created by the defendant for the unprivileged purpose. It appears to us not to matter which motive is relied upon. If accomplishing the end by one of them is a wrong to the plaintiff, accomplishing it by either of the others must be equally a wrong.

It follows from what we have said that we are of opinion that both counts of the declaration disclose a good cause of action, although the first, on the authority of May v. Wood, 172 Mass. 14, 51 N. E. 191, must be held insufficient in point of form. The second is not within the authority or reason of that case, and is in a form similar to the third count, which was held good in Walker v. Cronin. See Lumley v. Gye, 2 El. & Bl. 216. As to that the demurrer will be overruled. As to the other the demurrer will be sustained, but it seems to us that under the circumstances the plaintiff should be given an opportunity to amend.

Demurrer to first count sustained. Demurrer to second count overruled.

CHAPTER V

LIABILITY OF PRINCIPAL TO THIRD PERSON

SECTION 1.—FOR THE AGENT'S CONTRACTS

I. Disclosed Principal

WEBSTER v. CLARK.

(Superior Court of Judicature of New Hampshire, 1855. 30 N. H. 245.)

Assumpsit on an account annexed to the writ amounting to $260.22. Verdict for plaintiff.

Eastman, J.[1] We cannot entertain any doubt of the competency of the evidence to show Neal to be the agent of the defendant. He occupied a store on which was the sign of "John T. Neal, Agent." On his cards and bills he was designated in the same way. To the witness, who inquired of him for whom he was agent, he made a reply which induced the witness to call upon Clark, and inquire of him if Neal was his agent, and upon the inquiry being thus made, Clark frankly answered that he was. He, moreover, agreed that goods might be sent to Neal, as he had desired. It also appeared that Clark was frequently in and out of the store, engaged in conversation with Neal. This plain admission of the defendant, coupled with the other circumstances, was entirely competent to show the agency, and thus settle the first exception taken at the trial. It is unnecessary to examine it further, as it appears to be yielded in the argument.

Neal's agency being thus established, it follows that whatever he might do within the legitimate scope of that agency would bind the defendant, as much so as if done by himself. Story on Agency, § 126; Paley on Agency, 200; 2 Kent's Com. 620; Lobdell v. Baker, 1 Metc. (Mass.) 202, 35 Am. Dec. 358; Towle v. Leavitt, 3 Foster's Rep. 374.

Before any goods were sent, the defendant informed the plaintiff's clerk that Neal was his agent, and that the plaintiffs might send goods to Neal. Neal, as the defendant's agent, accordingly ordered several bills of goods, and afterwards, between the ordering of each bill, stated that he had received the goods, although he did not specify the quantity. These acts and admissions of Neal were those of Clark, and were competent to show that he had ordered goods of the

[1] Part of the opinion is omitted.

plaintiffs, and had also received goods. The evidence was sufficient to charge the defendant for some goods; for at least a nominal sum, if no more. * * * - - -

Judgment upon the verdict.

BRENNER v. LAWRENCE.

(Supreme Court, Trial Term, New York County, 1899. 27 Misc. Rep. 755, 58 N. Y. Supp. 769.)

Told A this cash ier to make a check in favor of J for an acct Owed J A signed it. A, Cashier Held Pbound.

McADAM, J. The defendants conducted a banking house under the name of Lawrence & Simonds. They were indebted to the plaintiff in the sum of $425, and, plaintiff calling upon them for the money, they instructed their cashier to make out a check in favor of the plaintiff for the amount due. The cashier, according to the custom of bankers, drew a check upon his principals, signing it "H. M. Moore, Cashier." The defendants failed shortly afterwards, so that the check was not paid, and the action is against the defendants as drawers of the check to recover the amount due. The act of Moore, according to the plain intention of the parties, was the act of the defendants, done in their business, by their direction, for their benefit, and bound them as effectually as if the check had been signed by the defendants themselves. Elwell v. Dodge, 33 Barb. 336; Bank of the State v. Muskingham Branch Bank, 29 N. Y. 619; Lockwood v. Coley (C. C.) 22 Fed. 192; Melledge v. Iron Co., 59 Mass. (5 Cush.) 158, 51 Am. Dec. 59; Houghton v. Bank, 26 Wis. 663, 7 Am. Rep. 107. Whether in the hands of a bona fide third person, having no knowledge of the facts, the signing by Moore would hold him individually (the word "cashier" being regarded merely as descriptio personæ) is a question that need not be considered, for the plaintiff, who had the transaction, sues upon it, and he knew that Moore was a mere agent, performing an act in the line of his duty for his employers, the defendants, for their benefit and on their account; and it is for this reason that the act is in law theirs, not his.

The verdict in favor of the plaintiff was properly directed, and the motion for a new trial must be denied.

DAVIS v. LYNCH.

(Supreme Court of New York, Appellate Term, 1900. 31 Misc. Rep. 724, 65 N. Y. Supp. 225.)

Action on a contract. From an order dismissing the complaint plaintiff appeals.

O'GORMAN, J. Although the written contract in question was signed by George M. Lynch, there is sufficient in plaintiff's proofs to justify the finding that George M. Lynch was at the time acting

as the defendant's agent, and was so regarded by both parties. It was, therefore, error to grant the defendant's motion to dismiss the complaint.

If an agent possessing due authority makes a contract in his own name, his principal, whether known or unknown, may be sued thereon, unless from the attendant circumstances it is the clear intent of the parties that exclusive credit is given to the agent, and that no resort shall in any event be had against the principal.[2] Story, Ag. § 160a; Coleman v. Bank, 53 N. Y. 393; Hall v. Lauderdale, 46 N. Y. 70. We are aware that a contrary rule was declared in Re Bateman, 7 Misc. Rep. 633, 28 N. Y. Supp. 36, but the statement of the law there made is not in harmony with the authorities. Although that case was affirmed by the court of appeals, the judgment was upheld on other grounds.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event. All concur.

MARVIN v. WILBER.

(Court of Appeals of New York, 1873. 52 N. Y. 270.)

Action for the purchase price of hops alleged to have been sold to defendant. The answer set up, among other things, a defect of parties defendant in the omission to join George I. Wilber. Defendant moved for a nonsuit for nonjoinder of his partner. Motion denied, verdict for defendant. The case comes up on appeal from judgment of the General Term of the Supreme Court in favor of plaintiff.

PECKHAM, J. One Vosburgh was an agent of Wilber & Son for the purchase of hops; he was agent for the firm only, not for this defendant severally. Waive any question of the statute of frauds for this purpose, and assume that he purchased of the plaintiff as agent of the defendant the hops in question; that such purchase was made expressly for the defendant, as thus stated by Vosburgh, although he had no authority so to purchase, is the defendant severally liable for such a purchase?

I know of no principle upon which such an action can be maintained. The whole case is that a person has assumed to act for another and incurs an obligation against him without authority, and

[2] The act of the agent within the scope of his authority is the act of the principal. Renard v. Turner, 42 Ala. 117 (1868); Jones v. Gould, 123 App. Div. 236, 108 N. Y. Supp. 31 (1908). It would be anomalous and unconscionable to allow the principal to contest the right of the third person on a contract made by the agent. Young v. Stein, 152 Mich. 310, 116 N. W. 195, 17 L. R. A. (N. S.) 231, 125 Am. St. Rep. 412 (1908). And it matters not whether the act of the agent was within the real, or his apparent, authority. North River Bank v. Aymar, 3 Hill (N. Y.) 262 (1842).

we are asked whether such an obligation is valid. The plain answer seems to be that the alleged principal never personally made such a contract, and the assumed agent never had any authority to make it. Hence, none was made by the defendant.

But it is claimed that this action lies against defendant alone, upon the ground that a "representation made by a general agent is just as binding on the defendant as if made by himself." True, where he is acting within the line of his agency; but that assumes that Vosburgh was the general agent of the defendant, which is not true.

If he were the general agent of defendant, of course he had the right to make this contract for him; but he was the general agent of the firm, and not of the defendant, individually, at all.

The assumption being wholly unfounded, the whole inference founded thereon fails.

Vosburgh had no real authority from the defendant; none is pretended; and he was clothed with no apparent authority from him individually.

An individual and a firm liability are very different things. They may be different to the creditor as well as to the firm; one may be solvent and the other not.

The counsel cites many cases to sustain the decision of the trial judge, but they are cases of dormant partners, who confessedly need not be sued if the plaintiff did not know of the existence of the dormant partner. Such are the cases in New York Dry Dock Co. v. Treadwell, 19 Wend. 525; Clarkson v. Carter, 3 Cow. 84; Clark v. Miller, 4 Wend. 628; North v. Bloss, 30 N. Y. 374; Hurlbut v. Post, 1 Bosw. 36. So if a party purchase for himself, without disclosing that he had a partner, and the vendor was ignorant thereof, the action may be brought against the party alone who made the contract. So an agent can bind himself by not disclosing his agency, but he cannot bind the party for whom he is not an agent no matter how much he assumes. He cannot create an agency by representations.

This action would undoubtedly lie if it could be established that the agent of a firm to buy hops was therefore and thereby the agent of an individual member of that firm, authorized to buy for him and to make him individually liable therefor. But that position the plaintiff's counsel has not attempted to establish. He cites no authority to that effect and takes no such position. He simply argues upon the assumption that Vosburgh was the agent of this defendant, and as such authorized to bind him as far as he could bind himself. The court must have acted upon that principle in its charge, that if the plaintiff did not know that Vosburgh was acting for the firm, but was informed that he acted for the defendant, that then the defendant was liable severally. This cannot be maintained. No amount of representations can create an agency. Any person may bind himself as he pleases. But to be bound by the act of another, that other must have real or apparent authority to do the act. In this case the as-

sumed agent had neither. This defendant set up in his answer that his son was a necessary party, but the plaintiff refused to amend. The judgment should be reversed, new trial granted, costs to abide the event. All concur.

FT. WORTH & D. C. R. CO. v. JOHNSON & TRICE.

(Court of Appeals of Texas, 1884. 2 Willson, Civ. Cas. Ct. App. §§ 232, 234.)

WHITE, P. J.[3] * * * In this case Trice & Johnson sued the railroad company to recover the value of beef furnished to one Barker, claiming that Barker was the agent of the company, and authorized to bind it for the beef purchased by him. Barker was roadmaster for the company, and he also kept a boarding or eating house in some box cars belonging to the company, which cars were furnished him by the company free of charge. He fed and lodged hands who were in the employ of the company. The beef furnished by Trice & Johnson was for the boarding house kept by Barker. Barker, when he purchased the beef, told Trice that the company was responsible for it. There was no evidence, except the declarations of Barker, that he had any authority to bind the company for the beef. *Held,* that there was no sufficient proof that Barker was the agent of the company authorized to bind it by the purchase of the beef.

§ 234. Special agent; principal not bound for acts of, unless, etc. That a party is agent for another does not render such other liable for every contract the agent may make. To be binding upon the principal, the contract must come within the apparent scope of the agent's authority. With regard to special agents, the rule is that if the agent exceeds the special and limited authority conferred on him, his principal is not bound by his acts, but they become mere nullities so far as he is concerned, unless, indeed, he has held him out as possessing a more enlarged authority. Story on Agency (9th Ed.) § 126. The agency conferred upon a roadmaster is special, and does not confer authority to bind the company for provisions purchased to supply a boarding house.[4] * * *

Reversed and remanded.

[3] Part of the opinion is omitted.

[4] The agent cannot increase, or enlarge, his authority by unauthorized acts so as to make his principal liable to third persons therefor. White v. Lee, 97 Miss. 493, 52 South. 206 (1910). See, also, Spies v. Stein, 70 Neb. 641, 97 N. W. 752 (1903), holding that the unauthorized acts of an agent, not within the apparent scope of his authority, and not ratified by the principal, actually or constructively, cannot bind the principal. This is especially true if the third person is aware of the want of authority, Carter v. Ætna Loan Co., 61 Mo. App. 218 (1895); Barton-Parker Mfg. Co. v. Wilson, 96 Minn. 334, 104 N. W. 968 (1905), and still more so when the agent is a special one, Fox v. Fisk, 6 How. (Miss.) 328 (1842).

HYDE v. PAIGE.[5]

(Supreme Court of New York, 1850. 9 Barb. 150.)

HAND, J. I think the only point in the case is, whether Paige, the plaintiff below, can call upon the defendants below, after taking Moulton's note for the price of the goods sold. Moulton testified that he bought the hay of the plaintiff for the defendants, in 1839 or 1840, and gave his own note for the amount, which he had never paid, and that he was insolvent. The plaintiff wanted Moulton's note, who declined at first to give it, saying the hay was for Hyde, for whom he was purchasing it. But the plaintiff insisted upon Moulton's own note, which he finally gave. The note was payable on demand, and there was no proof that it had been given up. Moulton was the only witness sworn, and it is impossible not to see that the plaintiff relied entirely upon Moulton to pay for the hay.

Where a vendor sells goods to an agent, and with full knowledge of the agency, takes the note of the agent, for the purchase money, and relies upon his credit, he can not resort to the principal. Beebee v. Robert, 12 Wend. 417, 27 Am. Dec. 132; Pentz v. Stanton, 10 Wend. 275, 25 Am. Dec. 558; Patterson v. Gandasequi, 15 East, 62; Emly v. Lye, Id. 7; Addison v. Gandasequi, 4 Taunt. 574. And see Waydell v. Luer, 3 Denio, 410. It clearly appears that this was done in this case. Six or seven years have elapsed, and the agent has failed in business, and now the vendor attempts to collect the debt of the principal. This he can not do.

It is said this was a question of fact for the justice, and that his finding is conclusive. But there is no conflict of evidence. The only witness in the cause was called by the plaintiff, and he is clear, distinct and unequivocal in his relation of this portion of the transaction.

There being no dispute about what the witness testified, nor any ambiguity or doubt as to the meaning of his language, the facts are undisputed, and the effect of his testimony becomes matter of law.

The judgment of the county court must be affirmed.

[5] Accord: Paige v. Stone, 10 Metc. (Mass.) 160, 43 Am. Dec. 420 (1845); Ranken v. Deforest, 18 Barb. 143 (1854). See, also, Silver v. Jordan, 136 Mass. 319 (1884), in which the third person charged the goods sold to the agent, who purchased them for defendant. The mere taking of the personal obligation of a known agent is a prima facie presumption that credit is given to the agent alone, and the principal is not liable. Merrell v. Witherby, 120 Ala. 418, 23 South. 994, 26 South. 974, 74 Am. St. Rep. 39 (1898).

DOWDEN v. CRYDER.

(Court of Errors and Appeals of New Jersey, 1893. 55 N. J. Law, 329, 26 Atl. 941.)

DIXON, J.[6] E. H. Carmack drew a draft on the defendant for $3,200, payable four months after date to his own order, and the defendant accepted it for Carmack's accommodation. Thereupon Carmack indorsed it, and delivered it to one Barnett, with authority to negotiate it for cash at a reasonable discount. Barnett transferred it to the plaintiff for $2,060 cash and a diamond necklace, which they valued at $1,100, and then absconded. At the time of the transfer the plaintiff knew that Barnett was not the owner of the draft, but held it merely as agent of Carmack for negotiation. Carmack repudiated the transfer, and the draft went to protest; hence this suit.

At the trial in the Essex circuit the cause was submitted to the jury on the question of fact whether the necklace, prior to the transfer, was the property of the plaintiff or was the property of Barnett, held by the plaintiff to secure Barnett's debt to him; and the jury were instructed that in the former case the plaintiff might recover, but could not in the latter. They found for the defendant. The cause is before us on exceptions to the charge of the judge and to his refusals to charge in accordance with the plaintiff's requests.

First the plaintiff asked the judge to charge that the plaintiff's title to the draft could not be invalidated unless the circumstances under which he took it proved actual fraud; that mere carelessness would not impair his title. This legal rule is thoroughly established (Hamilton v. Vought, 34 N. J. Law, 187; Copper v. Jersey City, 44 N. J. Law, 634), but it is inapplicable to the present case. The defect found in the plaintiff's title sprang, not from the law relating to commercial paper, but from the law of agency. It is a universal principle in the law of agency that the powers of the agent are to be exercised for the benefit of the principal, and not of the agent or third parties. Jaques v. Todd, 1 Amer. Lead. Cas. (5th Ed.) 687. Persons dealing with one whom they know to be an agent, and to be exercising his authority for his own benefit, acquire no rights against the principal by the transaction. Stainer v. Tysen, 3 Hill, 279; Mecutchen v. Kennady, 27 N. J. Law, 230; Safe-Deposit Co. v. Abbott, 44 N. J. Law, 257; Bank v. Underhill, 102 N. Y. 336, 7 N. E. 293. Such a transaction is usually, and perhaps properly, spoken of by the courts as fraudulent, but, however honest the intention of the parties, the agent's act is invalid merely because circumstances known to both prove it to be ultra vires. In the present case the plaintiff sought to get rid of the imputation of bad faith, by claiming that Barnett had told him he had authority to accept the diamonds in exchange for the draft; but it was not pretended that such authority

[6] Part of the opinion is omitted.

was supposed to have been given with knowledge that the agent had a personal interest in the redemption of the diamonds. Nothing short of power expressly granted to the agent to deal with the draft for his own benefit would validate such a use of it in favor of one cognizant of the facts. Consequently, on the fact found by the jury, the plaintiff's title was defeated, if not by his actual fraud, by his knowledge of the agent's misappropriation of the principal's property.[7] This request was rightly refused, save as its substance was embodied in the charge delivered.

The second request was to charge that, if the agent represented to the plaintiff that he had authority to exchange the draft for money and diamonds, and the plaintiff believed him, Carmack was estopped from denying the authority; and Campbell v. Nichols, 33 N. J. Law, 81, is cited to support this proposition. For reasons already stated, this request did not reach the merits of the case, because it was not claimed that Carmack had any notice of his agent's interest in the diamonds. But, aside from this, the proposition was intrinsically unsound. The declarations of an agent, although accompanying his acts, constitute no evidence of the extent of his authority. Story, Ag. § 136; Brigham v. Peters, 1 Gray, 139; Baker v. Gerrish, 14 Allen, 201; Gifford v. Landrine, 37 N. J. Eq. 127; Farmers' Bank v. Butchers' Bank, 16 N. Y. 134, 69 Am. Dec. 678. The decision in Campbell v. Nichols does not militate with this rule. The representation there upheld as an estoppel against the principal related, not to the scope of the agent's power, but to an extrinsic circumstance affecting the character of the instrument which the agent was empowered to dispose of, and which circumstance would be within the cognizance of the agent or his principal, but not of those dealing with the agent. The distinction between a representation by an agent as to such extrinsic facts and his representation as to the scope of his authority is clearly drawn in Farmers' Bank v. Butchers' Bank, ubi supra. * * *

Judgment affirmed.

[7] It does not matter that the principal received full value in the transaction, if his agent also acted for the third person. Tyler v. Sanborn, 128 Ill. 136, 21 N. E. 193, 4 L. R. A. 218, 15 Am. St. Rep. 97 (1889). But see Garrett v. Trabue, 82 Ala. 227, 3 South. 149 (1886), in which it was shown the agent intended to make secret profits out of the transaction. If the third party has acted bona fide he cannot be affected by the unfaithfulness of the agent, of which he had no notice or knowledge. Hambro v. Burnand, [1904] 2 K. B. 10, 9 Com. Cas. 251, 73 L. J. K. B. 669, 90 L. T. Rep. N. S. 803, 20 T. L. R. 398, 52 W. R. 583, reversing [1903] 2 K. B. 399, 8 Com. Cas. 252, 72 L. J. K. B. 662, 89 L. T. Rep. N. S. 180, 19 T. L. R. 284, 51 W. R. 652.

EMPIRE STATE INS. CO. v. AMERICAN CENT. INS. CO.

(Court of Appeals of New York, 1893. 138 N. Y. 446, 34 N. E. 200.)

EARL, J. The firm of Straub & Morris were agents of the plaintiff at Pittsburgh, Pa., in August, 1889, and on the 7th day of that month, as such agents, they issued a policy of insurance whereby the plaintiff insured the Ridgway Lumber Company against loss by fire to the amount of $2,500. Subsequently, on the 20th day of August, the defendant appointed them its agents also. They reported that policy to the plaintiff on the 19th day of August, and it wrote to its special agent, Frank Aull, to have the risk reduced to $1,000, and he notified the agents to cancel the policy, or reduce the risk to $1,000, by reinsurance. Thereafter, on the 21st day of September, Straub & Morris, being then agents for the plaintiff and defendant, reinsured plaintiff's risk with the defendant, to the amount of $1,500, by entering the agreement for reinsurance in their binder book. Subsequently, on the 12th day of October, the property insured was destroyed by fire, before the reinsurance had been reported to the defendant or had come to its knowledge. The plaintiff paid the amount of its liability under its policy for the loss, and then brought this action against the defendant to recover three-fifths thereof under its reinsurance agreement. The defendant refused payment, and defended the action on the ground that Straub & Morris could not bind it by the agreement for reinsurance, because they were at the same time the agents of the plaintiff, and could not act in the dual capacity of agents for both parties in effecting the reinsurance. The court below upheld the contention of the defendant, and whether it was right in so doing is the sole question for our determination.

It is not doubted that the same person may sometimes act as agent for the two parties in the same transaction; but he can do so only in case he has no discretion to exercise for either party. An agent to sell for one party may also act as agent for the buyer, but only in case the price and terms of sale have been fixed by each party, so that nothing is left to his discretion. But an agent to sell, intrusted with a discretion, and thus bound to obtain the best price he can, cannot buy for himself or as agent for another. In such a case he would occupy an antagonistic position, and there would be a conflict of interests. He could not faithfully serve the one party without betraying the interests of the other. He would at least be under great temptation to betray the interest of one of the parties. So a person may sometimes act as agent of both parties in the making of any contract; but he cannot do so when he is invested with a discretion by each party, and when each is entitled to the benefit of his skill and judgment. The rules of law upon this subject have been laid down and illustrated in many cases, of which it is sufficient for the present purpose to cite the following: Utica Ins. Co. v. Toledo Ins. Co., 17 Barb. 132; Ritt v. Insurance Co.,

41 Barb. 353; New York Cent. Ins. Co. v. National Protection Ins. Co., 14 N. Y. 85; Claflin v. Bank, 25 N. Y. 293; Murray v. Beard, 102 N. Y. 505, 509, 7 N. E. 553; Porter v. Woodruff, 36 N. J. Eq. 174; Michoud v. Girod, 4 How. 503, 11 L. Ed. 1076.

Contracts thus negotiated are void at the option of any nonassenting party thereto. The policy of the law condemns them. It matters not that the agent has acted fairly and honestly, and even that neither party to the contract has suffered injury. It is enough to condemn the contract that the common agent in fact had any, even the least, discretion to exercise for the parties. As said by the chancellor in Porter v. Woodruff: "So jealous is the law upon this point that it will not even allow the agent or trustee to put himself in a position in which to be honest must be a strain upon him."[8]

These principles of law are not disputed by the counsel who argued this case, and they are so thoroughly embodied in the law that they could not be. Their difference is as to their application to this case. The learned counsel for the plaintiff contends that Straub & Morris had no discretion to exercise for the plaintiff in effecting the reinsurance; that, so far as they had any discretion to exercise, it was for the defendant alone; and thus, that there was no antagonism or incompatibility between the duties they owed to each of their principals; and here we think is his mistake. Straub & Morris were ordered to reduce the plaintiff's risk by canceling the policy, or by reinsuring three-fifths thereof, and this order they were absolutely bound to obey. They had a discretion to exercise in determining whether they would cancel or reinsure, and in making that determination they acted solely for the plaintiff. They determined to reinsure, and thus the option they had to cancel disappeared as if it had never existed, and it can play no part in this case. They then owed the duty to the plaintiff to reinsure, if they could. It does not appear why the plaintiff was unwilling to carry the $2,500 of insurance. It may have been because it thought there was overinsurance, or that the risk was too hazardous, or that, for some other reason, the insurance was unprofitable or undesirable. It might have been difficult to obtain the reinsurance from any other good company. It is quite clear from what appears in this record that the defendant would not knowingly have reinsured the risk. In order to procure the reinsurance the agents owed the plaintiff their utmost diligence and skill. They had issued an improvident or undesirable policy, and they must have felt under a very strong obli-

[8] See Ferguson v. Gooch, 94 Va. 1, 26 S. E. 397, 40 L. R. A. 234 (1896), with full discussion and citation of authorities. Especially pernicious are contracts in which it appears the third person paid the agent a commission on business transacted with his principal. City of Findlay v. Pertz, 66 Fed. 427, 13 C. C. A. 559, 29 L. R. A. 188 (1895), affirmed 74 Fed. 681, 20 C. C. A. 662 (1896).

As to whether the contract is void or voidable, see N. Y. C. Ins. Co. v. Nat. Protection Ins. Co., 14 N. Y. 85 (1850), reversing 20 Barb. 468 (1854); Huggins Co. v. People's Ins. Co., 41 Mo. App. 530 (1890).

gation to reduce the risk as directed. They owed a duty to the plaintiff to take the reinsurance, even if they were convinced that it was undesirable, hazardous, and unprofitable, and the more thoroughly they were convinced of these things the more urgent was their duty to protect the plaintiff. On the contrary, as agents of the defendant, they were bound to exercise their discretion on its behalf, and not make the reinsurance without inquiring and knowing that the risk was a proper one for it to take. It was their duty to it not to take the risk if there was overinsurance, or if it was too hazardous, or if it was unprofitable and undesirable; and hence this was a case where they could not in this transaction serve the two masters.

There was conflict in their duties, and they were under a strong temptation to fail in their allegiance to one or the other of their principals; hence this agreement is clearly one which the policy of the law condemns, and we see no reason to doubt that the court below properly applied the principles of law; and its judgment should be affirmed, with costs. All concur.

WASSELL v. REARDON.

(Supreme Court of Arkansas, 1851. 11 Ark. [6 Eng.] 705, 44 Am. Dec. 245.)

WALKER, J.[9] The defendant executed to the plaintiff's attorneys a power of attorney by which they were empowered to confess judgment for said defendant on a note which the plaintiff had placed in the hands of such attorneys for collection. By virtue of this power judgment was regularly confessed and entered of record.

To this judgment it is objected:

1. That the attorney at law for the plaintiff could not act as attorney in fact for the defendant, touching the same subject matter on account of his prior retainer by the plaintiff—the interest and rights of the plaintiff and defendant being adverse.

2. That the judgment was not confessed until after the note was barred by limitation, and that it was the duty of the attorney to have interposed this defence. * * *

As a general rule it is true that agents cannot act so as to bind their principals, where they have or represent interests adverse to the principal's. This rule is founded upon the consideration that the principal bargains for the skill and vigilant attention of the agent to the subject matter entrusted to him: and the policy of the law will not tolerate the existence of an adverse interest in the agent to that of his principal for fear it may influence his conduct to the prejudice of interests of the principal. This well recognized rule is particularly applicable to buying and selling agents, where the principal contracts for the services of an agent at a time when he has no interest in the subject

[9] Part of the opinion is omitted.

entrusted to him but subsequently by his own act acquires interest in it adverse to that of the principal. In the case before us the attorney had no interest in the matter of his agency unless it should arise from his claim to compensation as a collector, which may or may not have been otherwise settled; nor had the plaintiff any interest whatever in the act to be done of which the principal, at the time he instituted him agent, was not fully advised; and if such disqualification existed he, by his own act, expressly waived it by conferring upon the agent such power with a knowledge of the facts. When it is remembered that the whole ground upon which this rule is based, rests upon the fraudulent advantage which such an interest may stimulate the agent to take to the prejudice of his principal's rights, it will scarcely be contended that the circumstances of this case bring it within the reason and spirit of the rule. The principal was informed of the nature and extent of the interest which the payee in the note had in the act to be performed by the agent. The facts disclosed in the instrument itself prove this; and that it was intended that the act to be performed should enure to the mutual benefit of both the payor and payee: to the first by saving him the expense incident to a suit in the usual form; to the other by facilitating and making certain a recovery.

This therefore was not a mere naked power in which the principal was alone interested, but a power coupled with an interest in a third person, made upon good and sufficient consideration, and in regard to which the principal was well advised, and so far from an undue advantage having been taken of him in the relationship in which the agent stood towards him, he only did that which every truthful honest man should do, and what every prudent, considerate attorney accedes to. The act which the attorney undertook to perform was in perfect harmony with the interest of his client and of the duty and integrity of defendant, the payor.[10] * * *

Judgment affirmed with costs.

[10] Two parties, no matter how diverse their interest, may by mutual consent make a third their agent to bind them. Fitzsimmons v. So. Exp. Co., 40 Ga. 330, 2 Am. Rep. 577 (1869); De Steiger v. Hollington, 17 Mo. App. 382 (1885); Adams Min. Co. v. Senter, 26 Mich. 73 (1872). The rule against double agency does not apply to cases in which there is no conflict in the duties assumed by the agent. Brit. Am. Assur. Co. v. Cooper, 6 Colo. App. 25, 40 Pac. 147 (1895); Colwell v. Keystone Iron Co., 36 Mich. 51 (1877).

TRUSLOW v. PARKERSBURG BRIDGE & TERMINAL R. CO.

(Supreme Court of Appeals of West Virginia, 1907. 61 W. Va. 628, 57 S. E. 51.)

SANDERS, P.[11] The Parkersburg Bridge & Terminal Railroad Company employed J. M. Mitchell to procure for it options on certain property on the south side of the Little Kanawha river from Parkersburg. For this service he was to receive a fixed compensation per day. Acting in this capacity, he took from the plaintiffs, Emma J. and W. F. Truslow, on the 21st day of November, 1902, an option on certain property owned by them, the title to which was in the female plaintiff, for which property the sum of $1,600 was to be paid. The option was taken in the name of J. A. Shrewsbury, assigned to Mitchell by Shrewsbury, and by Mitchell assigned to the railroad company. By its terms the option was to be accepted within 90 days, and on the 31st day of January, 1903, the company notified the plaintiffs in writing that it would accept the option, and upon execution to it of deed would pay the price agreed to be paid.

In the latter part of February, or the 1st of March, 1903, the company discovered that the agent, Mitchell, had been taking commission contracts on all the property optioned by him; that is, he agreed with the landowners that in case a sale was effected by him through the option taken he was to receive a certain additional sum—in this particular instance the sum being $75. Upon discovery of this fact, the relations between Mitchell and the company were severed; the company taking from Mitchell an assignment of all commission contracts taken by him. Negotiations were entered into with a view of obtaining from the plaintiffs a contract more favorable to the company; and, it refusing to comply with the terms of the option, this suit was on the 16th day of January, 1904, instituted for the purpose of compelling a specific performance of the agreement. Upon a hearing the court decreed that the contract should be specifically enforced, and, from this decree, the railroad company has appealed. * * *

The appellant, after taking the assignment of the commission contract, retained the same in its possession, and has never offered to surrender to the appellees either this option or the commission contract, and its action in this respect indicates an intention on its part to avail itself of the benefits of the contract in case it should deem it expedient to do so. It filed these papers as exhibits with its answer, and relies upon its defense to this suit as a repudiation of the contract.

The fact that the appellant, with full knowledge of all the facts, ratified the contract made by Mitchell, renders immaterial another

[11] Part of the opinion is omitted.

question raised by counsel for it, and that is that whether or not the appellees knew of the double agency is immaterial, as the appellant had the right to disaffirm the contract upon discovering such double agency, irrespective of whether or not the appellees had notice of such agency, and regardless of whether or not the appellant could show that it was damaged thereby. This position is sound, both upon reason and authority. "When an agent acts for both parties in making a contract requiring the exercise of discretion, the contract is voidable in equity upon the application of either party, or the circumstance is available as a defense in an action at law upon the contract." 1 Am. & Eng. Ency. Law (2d Ed.) 1073; Lloyd v. Colston, 5 Bush, 587; Crump v. Ingersoll, 44 Minn. 84, 46 N. W. 141; Young v. Hughes, 32 N. J. Eq. 372; Fish v. Leser, 69 Ill. 394. "A man cannot be the agent of both the buyer and the seller in the same transaction, without the intelligent consent of both parties; nor can an agent act for himself and his principal, nor for two principals on opposite sides in the same transaction, without like consent. All such transactions are voidable, and may be repudiated by the principal without proof of injury on his part. Nothing will defeat the right of the principal except his own confirmation after full knowledge of all the facts." Ferguson v. Gooch, 94 Va. 1, 26 S. E. 397, 40 L. R. A. 234.

But, while this is true, it is equally as well settled that a principal may, upon discovering that his agent has acted in a double capacity, ratify and confirm his acts, and thus be bound in like manner as if the agent had not exceeded his authority, but had acted wholly within the powers given to him. "Where, with a knowledge of all the facts, the principal acquiesces in the acts of the agent under such circumstances as would make it his duty to repudiate such acts if he would avoid them, such acquiescence is a confirmation of the acts of the agent." Curry v. Hale, 15 W. Va. 867; Dewing v. Hutton, 48 W. Va. 577, 37 S. E. 670; Coulter v. Blatchley, 51 W. Va. 167, 41 S. E. 133; Frazier v. Brewer, 52 W. Va. 306, 43 S. E. 110. "Where a party originally had a right of defense or of action to defeat or set aside a transaction on the ground of actual or constructive fraud, he may lose such remedial right by a subsequent confirmation, by acquiescence, and even by mere delay or laches. * * * If the party originally possessing the remedial right has obtained full knowledge of all the material facts involved in the transaction, has become fully aware of its imperfection and of his own rights to impeach it, or ought, and might, with reasonable diligence have become so aware, and all undue influence is wholly removed so that he can give a perfectly free consent, and he acts deliberately, and with the intention of ratifying the voidable transaction, then his confirmation is binding, and his remedial right, defensive or affirmative, is destroyed." Pomeroy's Eq. Jur. § 964.

The right to disaffirm was waived by the appellant when, after discovery of Mitchell's agency for both parties, it took an assignment of the commission contract, and by its subsequent neglect and omission to notify the appellees that it would not be bound by the contract.[12]

We see no error in the decree of the circuit court, and it is affirmed.

II. UNDISCLOSED PRINCIPAL

(A) Simple Contracts

PATERSON v. GANDASEQUI.[13]

(Court of King's Bench, 1812. 15 East, 62, 13 Rev. Rep. 68.)

Action for goods sold and upon the common money counts. Defendant was a Spanish merchant who employed Larrazabal & Co., of London, merchants, to purchase goods for him for a foreign market upon a 2 per cent. commission. Larrazabal & Co. applied to Paterson to send to their counting house an assortment of silk hose with terms and prices. Defendant was present, inspected the samples, and selected such as he required. Larrazabal & Co. gave written orders for a large supply to fill defendant's order, but the invoices were made out in the name of Larrazabal & Co., and they were debited for the goods on plaintiff's books. Soon after, and before the credit expired, Larrazabal & Co. became insolvent, and thereupon plaintiffs demanded payment of defendant; which being refused, the present action was brought. At the trial Lord Ellenborough directed a nonsuit. On a motion to set aside the nonsuit a rule nisi was granted.

Lord ELLENBOROUGH, C. J. The Court have not the least doubt that if it distinctly appeared that the defendant was the person for whose use and whose account the goods were bought, and that the plaintiffs knew that fact at the time of the sale, there would not be the least pretence for charging the defendant in this action. But the doubt is, whether that does sufficiently appear by the evidence. It appears that the defendant was present at the counting-house of Lar-

[12] In the absence of dissent within a reasonable time, ratification is presumed. As to what is a reasonable time, see U. S. Rolling Stock Co. v. Atl. & Gt. West. R. Co., 34 Ohio St. 450, 32 Am. Rep. 380 (1878).

[13] In Addison v. Gandasequi, 4 Taunt. 574, 11 Rev. Rep. 689 (1812) Lord Mansfield on similar facts allowed the jury to say whether the goods were sold to Larrazabal & Co., or to Gandasequi through Larrazabal & Co., as factors; and refused to set aside their verdict for defendant. See, also, Silver v. Jordan, 136 Mass. 319 (1884), in which the contract was made with the agent alone, but the third person tried to hold the principal, and Beebe v. Robert, 12 Wend. 413, 27 Am. Dec. 132 (1834), in which it is held to be a question of fact to be determined from all the circumstances of the case whether the third person gave the agent exclusive credit.

razabal, where one of the plaintiffs had come by appointment, and in his presence inspected and selected such of the articles as he required: that the goods were afterwards ordered by Larrazabal & Co., credit given to them and the invoices made out in their name and sent to them. The question is, whether all this was done with a knowledge of the defendant being the principal? The law has been settled by a variety of cases, that an unknown principal, when discovered, is liable on the contracts which his agent makes for him: but that must be taken with some qualification, and a party may preclude himself from recovering over against the principal, by knowingly making the agent his debtor. It certainly appeared to me at the trial that the plaintiffs knew of the defendant being the principal, and had elected to take Larrazabal & Co. as their debtors, or I should not have nonsuited the plaintiffs: but as there may perhaps be a doubt upon the evidence, whether the plaintiffs had a perfect knowledge of that fact, it may be as well to have it reconsidered.

BAYLEY, J. There may be a particular course of dealing with respect to trade in favour of a foreign principal, that he shall not be liable in cases where a home principal would be liable: that would be a question for the jury. I have generally understood that the seller may look to the principal when he discovers him, unless he has abandoned his right to resort to him. I agree that where the seller knows the principal at the time, and yet elects to give credit to the agent, he must be taken to have abandoned such right, and cannot therefore afterwards charge the principal. I think it should be reconsidered in this case whether the plaintiffs did so.

Rule absolute.[14]

MEEKER v. CLAGHORN.

(Commission of Appeal of New York, 1871. 44 N. Y. 349.)

Action by assignee of J. B. & W. W. Cornell, to recover a balance for iron-work and cut-stone. The articles were furnished for a building of the defendants in Savannah, upon the order of their architect, Charles Shall. The defendants claimed that the articles were furnished by plaintiff's assignors, upon the credit of said Shall, and that they had paid him therefor; and the plaintiff claimed that they were furnished upon the order of said Shall, acting as agent for the defendants, and upon their credit.

The assignment to the plaintiff was in writing and absolute in terms. Two of his assignors testified in substance, on cross-examination, that "they expected to receive the amount recovered in the action."

EARL, Com.[15] The principles of law applicable to this case are

[14] The opinions of Grose and Le Blanc, JJ., are omitted.

[15] Part of the opinion is omitted.

elementary and undisputed. If the defendants were known to be the principals in the transaction, and Shall only their agent, then they are alone responsible, unless credit was given exclusively to the agent, in which event the agent alone was responsible. If however the defendants were not known to be the principals, and credit was at the time given to Shall, who was in fact an undisclosed agent, then the vendors could hold for payment, at their election, either the agent or the principals. If Shall was not in fact the agent of the defendants, and furnished these articles to them upon his agreement with them, then the defendants are not responsible to the plaintiff. Pentz v. Stanton, 10 Wend. 271, 25 Am. Dec. 558; Thomson v. Davenport, 9 Barn. & Cress. 78; Story Agency, §§ 267, 446, 447, 423; 1 Am. Lead. Cases, 607.

Keeping these principles of law in view, this case involves only questions of fact. The defendants can claim exemption from liability upon only one of two grounds: 1. That Shall was not their agent, and that the vendors dealt with him as principal; or, 2. That the vendors knew the defendants to be the principals, and gave the credit exclusively to the agent.

As to the first ground, there is some evidence tending to show that Shall was the agent of the defendants, and acted as such. * * * We must assume that Shall was in fact the agent of the defendants, and that the vendors knew it.

As to the second ground, the evidence should be quite clear that the vendors gave exclusive credit to the agent of known principals, before we can hold the principals exempt from liability. In all cases, where the principals seek exemption upon the ground that the credit was exclusively given to their agent, this should clearly appear, and they have the affirmative to show it; the natural presumption being, in all cases, that credit is given to the principal rather than to the agent. It is sufficient to say upon this branch of the case, that there is no conclusive evidence that the credit was given by the vendors, exclusively to the agent, and that they intended to look to him solely for their pay. It is true, that upon the ledger and day-book of the vendors, the articles were charged to Shall, and while this furnishes strong evidence that they were furnished upon his credit, it does not show it conclusively. The plaintiff gave some explanation, tending to weaken the effect of this evidence, and its weight under all the circumstances of the case, was for the referee.

The most that can be properly said in behalf of the defendants is, that the plaintiff made a very weak case. But if the circumstances of the case, and the evidence, and the legitimate inferences to be drawn from them tend in any degree to uphold the decision of the referee, we cannot disturb it; and it seems to me that this is such a case.

There is no sufficient evidence that Shall was the agent of the vendors, to receive payment for the articles furnished, in such a sense as

to bind them by the payment the defendants made to him, even if there is any competent evidence of such payment.

Within numerous decisions that have been made in this court and also in the Supreme Court, the plaintiff, under the absolute assignment in writing to him, is the legal holder of the claim against the defendants, and the real party in interest as plaintiff in this action.

I am therefore of the opinion that the judgment should be affirmed, with costs. All concur except LEONARD, Com., not sitting.

DARROW v. HORNE PRODUCE CO.

(Circuit Court of the United States, D. Indiana, 1893. 57 Fed. 463.)

BAKER, District Judge.[16] The question of the sufficiency of the complaint is raised by demurrer. The complaint, so far as material to the decision of the question involved, is as follows: That heretofore, the 21st day of January, 1893, the plaintiffs, at Chicago, Ill., sold to the defendant, through its agent and general manager, William Harris, a quantity of butter, as mentioned in the contract of sale and purchase thereof, which contract was and is in writing; that said contract, although made for and on account of these plaintiffs on the one hand, and for and on account of the defendant upon the other hand, was executed only in the names of the said respective agents, A. A. Kennard & Co., for these plaintiffs, and in the name of the said William Harris, by the style of Wm. Harris, for the defendant, but as matter of fact each of said agents thereby intended to bind his said principal thereby, and each of said agents was thereunto duly authorized by his said principal. * * *

It is undoubtedly true that parol testimony will not be permitted to control or contradict a contract in writing; but, in the absence of any recital appearing therein, it in no just sense contradicts the written contract to show by oral testimony, aliunde the writing, that the names signed to the contract are those of agents, and that undisclosed principals are the real parties in interest. Counsel has cited cases touching the rule applicable to sealed instruments. It is unnecessary to examine those cases, because the writing here declared on is a simple contract, not under seal.

A further review of the adjudged cases is unnecessary, as the true doctrine is found accurately stated in the elementary books. Story, Ag. (4th Ed.) § 1600, states the doctrine in these words: "Indeed, the doctrine maintained in the more recent authorities is of a far more comprehensive extent. It is that, if the agent possesses due authority to make a written contract not under seal, and he makes it in his own

[16] Part of the opinion is omitted.

name, whether he describes himself to be agent or not, and whether the principal be known or unknown, he, the agent, will be liable to be sued, and be entitled to sue thereon, and his principal also will be liable to be sued and be entitled to sue thereon, in all cases, unless from the attendant circumstances it is clearly manifested that an exclusive credit is given to the agent, and it is intended by both parties that no resort shall in any event be had by or against the principal upon it. The doctrine thus asserted has this title to commendation and support: that it not only furnishes a sound rule for the exposition of contracts, but that it proceeds upon a principle of reciprocity, and gives to the other contracting party the same rights and remedies against the agent and principal which they possess against him." Nor does this doctrine contradict or vary the written instrument. The same writer observes: "It does not deny that it is binding on those whom on the face of it it purports to bind, but shows that it also binds another by reason that the act of the agent in signing the agreement in pursuance of his authority is in law the act of the principal." Higgins v. Senior, 8 Mees. & W. 834, 845, and other cases cited under the above section.

Whart. Ag. § 298, states the doctrine thus: "On nonnegotiable instruments, where the agent is prima facie the contracting party, unless it should appear that the agent is the person exclusively privileged or bound, the principal can sue or be sued, and in the latter case the contracting party can sue either principal or agent."

Mechem, Ag. §§ 695–700, discusses the subject of the liability of undisclosed principals, and of principals known, but not mentioned in contracts executed on their account, but signed by the agent alone, and he shows that in such cases, unless the principal in the mean time has in good faith paid the agent supposing he was the principal, the other party may overpass the agent, and sue the principal in the first instance. In section 701 he says: "This rule applies to all simple contracts, whether written or unwritten, entered into by an agent in his own name and within the scope of his authority, although the name of the principal does not appear in the instrument, and was not disclosed, and although the party dealing with the agent supposed that the latter was acting for himself. And this rule obtains as well in respect to contracts which are required to be in writing as those to whose validity writing is not essential. It does not violate the principle which forbids the contradiction of a written agreement by parol evidence, nor that which forbids the discharging of a party by parol from the obligation of his written contract. The writing is not contradicted, nor is the agent discharged; the result is merely that an additional party is made liable."

"Whatever the original merits of the rule," says the court in Byington v. Simpson, 134 Mass. 169, 45 Am. Rep. 314, "that a party not mentioned in a simple contract in writing may be charged as a principal upon oral evidence, even when the writing gives no indication

of an intent to bind any other person than the signer we cannot reopen it, for it is as well settled as any part of the law of agency."

These authorities demonstrate that the first contention of the defendant is untenable.[17] * * *

Demurrer overruled.

THOMSON v. DAVENPORT.

(Court of King's Bench, 1829. 9 Barn. & C. 78, 4 M. & R. 110, 17 E. C. L. 45.)

The plaintiff below declared for goods sold and delivered. Plea, general issue. Verdict for plaintiff.

Lord TENTERDEN, C. J. I am of opinion that the direction given by the learned Recorder in this case was right, and that the verdict was also right. I take it to be a general rule, that if a person sells goods (supposing at the time of the contract he is dealing with a principal), but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the mean time have debited the agent with it, he may afterwards recover the amount from the real principal; subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal. On the other hand, if at the time of the sale the seller knows, not only that the person who is nominally dealing with him is not principal but agent, and also knows who the principal really is, and, notwithstanding all that knowledge, chooses to make the agent his debtor, dealing with him and him alone, then, according to the cases of Addison v. Gandassequi, 4 Taunt. 574, and Paterson v. Gandasequi, 15 East, 62, the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other. The present is a middle case. At the time of the dealing for the goods, the plaintiffs were informed that McKune, who came to them to buy the goods, was dealing for another, that is, that he was an agent, but they were not informed

[17] See, also, In re Bateman, 7 Misc. Rep. 633, 28 N. Y. Supp. 36 (1894); Lindeke Land Co. v. Levy, 76 Minn. 364, 79 N. W. 314 (1899); Barker v. Garvey, 83 Ill. 184 (1876), approved in Heywood Bros. Co. v. Andrews, 89 Ill. App. 195 (1900); Edwards v. Gildemeister, 61 Kan. 141, 59 Pac. 259 (1899); Barbre v. Goodale, 28 Or. 465, 471, 38 Pac. 67, 43 Pac. 378 (1896); ante, p. 466; Waddill v. Sebree, 88 Va. 1012, 14 S. E. 849, 29 Am. St. Rep. 766 (1892); Mechanics' Bank v. Bank of Columbia, 5 Wheat. 326, 5 L. Ed. 100 (1820). Especially, see the interesting review of the authorities in Chandler v. Coe, 54 N. H. 561 (1874).

Cf. Kelly v. Thuey, 102 Mo. 522, 15 S. W. 62 (1890), in which the court held the contract showed both parties intended that no resort should be had by or against the undisclosed principal, and Kayton v. Barnett, 116 N. Y. 625, 23 N. E. 24 (1889), in which the undisclosed principal was held liable, although it was shown the third person would not have dealt with him if he had been disclosed.

who the principal was. They had not, therefore, at that time the means of making their election. It is true that they might, perhaps, have obtained those means if they had made further inquiry; but they made no further inquiry. Not knowing who the principal really was, they had not the power at that instant of making their election. That being so, it seems to me that this middle case falls in substance and effect within the first proposition which I have mentioned, the case of a person not known to be an agent; and not within the second, where the buyer is not merely known to be agent, but the name of his principal is also known. There may be another case, and that is where a British merchant is buying for a foreigner. According to the universal understanding of merchants, and of all persons in trade, the credit is then considered to be given to the British buyer, and not to the foreigner. In this case, the buyers lived at Dumfries; and a question might have been raised for the consideration of the jury, Whether, in consequence of their living at Dumfries, it may not have been understood among all persons at Liverpool, where there are great dealings with Scotch houses, that the plaintiffs had given credit to McKune only, and not to a person living, though not in a foreign country, yet, in that part of the king's dominions which rendered him not amenable to any process of our courts? But, instead of directing the attention of the Recorder to any matter of that nature, the point insisted upon by the learned counsel at the trial was, that it ought to have been part of the direction to the jury, that if they were satisfied the plaintiffs, at the time of the order being given, knew that McKune was buying goods for another, even though his principal might not be made known to them, they, by afterwards debiting McKune, had elected him for their debtor. The point made by the defendant's counsel, therefore, was that if the plaintiffs knew that McKune was dealing with them as agent, though they did not know the name of the principal, they could not turn round on him. The Recorder thought otherwise: he thought that though they did not know that McKune was buying as agent, yet, if they did not know who his principal really was, so as to be able to write him down as their debtor, the defendant was liable, and so he left the question to the jury, and I think he did right in so doing. The judgment of the court below must therefore be affirmed.

BAYLEY, J. There may be a course of trade by which the seller will be confined to the agent who is buying, and not be at liberty at all to look to the principal. Generally speaking, that is the case where an agent here buys for a house abroad. There may also have been evidence of a course of trade, applicable to an agent living here acting for a firm resident in Scotland. But that does not appear to have been made a point in this case, and it is not included in the objection which is now made to the charge of the Recorder. In my opinion, the direction of the Recorder was right; and it was, with the limits I have mentioned, perfectly consistent with the justice of the case.

Where a purchase is made by an agent, the agent does not of necessity so contract as to make himself personally liable; but he *may* do so. If he does make himself personally liable, it does not follow that the principal may not be liable also, subject to this qualification, that the principal shall not be prejudiced by being made personally liable, if the justice of the case is that he should not be personally liable. If the principal has paid the agent, or if the state of accounts between the agent here and the principal would make it unjust that the seller should call on the principal, the fact of payment, or such a state of accounts, would be an answer to the action brought by the seller where he had looked to the responsibility of the agent. But the seller, who knows who the principal is, and instead of debiting that principal, debits the agent, is considered, according to the authorities which have been referred to, as consenting to look to the agent only, and is thereby precluded from looking to the principal. But there are cases which establish this position, that although he debits the agent who has contracted in such a way as to make himself personally liable, yet, unless the seller does something to exonerate the principal, and to say that he will look to the agent only, he is at liberty to look to the principal when that principal is discovered. In the present case the seller knew that there was a principal; but there is no authority to show that mere knowledge that there is a principal, destroys the right of the seller to look to that principal as soon as he knows who that principal is, provided he did not know who he was at the time when the purchase was originally made. It is said, that the seller ought to have asked the name of the principal, and charged him with the price of the goods. By omitting to do so, he might have lost his right to claim payment from the principal, had the latter paid the agent, or had the state of the accounts between the principal and the agent been such as to make it unjust that the former should be called upon to make the payment. But in a case circumstanced as this case is, where it does not appear but that the man who has had the goods has not paid for them, what is the justice of the case? That he should pay for them to the seller or to the solvent agent, or to the estate of the insolvent agent, who has made no payment in respect of these goods. The justice of the case is, as it seems to me, all on one side, namely, that the seller shall be paid, and that the buyer (the principal) shall be the person to pay him, provided he has not paid anybody else. Now, upon the evidence, it appears that the defendant had the goods, and has not paid for them either to McKune or to the present plaintiffs, or to anybody else. He will be liable to pay for them either to the plaintiffs or to McKune's estate. The justice of the case, as it seems to me, is, that he should pay the plaintiffs, who were the sellers, and not any other person. I am, therefore, of opinion that the direction of the Recorder was right.

LITTLEDALE, J. The general principle of law is, that the seller shall have his remedy against the principal, rather than against any

other person. Where goods are bought by an agent, who does not at the time disclose that he is acting as agent, the vendor, although he has debited the agent, may, upon discovering the principal, resort to him for payment. But if the principal be known to the seller at the time when he makes the contract, and he, with a full knowledge of the principal, chooses to debit the agent, he thereby makes his election, and cannot afterwards charge the principal. Or if in such case he debits the principal, he cannot afterwards charge the agent. There is a third case; the seller may, in his invoice and bill of parcels, mention both principal and agent: he may debit A. as a purchaser for goods bought through B., his agent. In that case, he thereby makes his election to charge the principal, and cannot afterwards resort to the agent. The general principle is, that the seller shall have his remedy against the principal, although he may by electing to take the agent as his debtor abandon his right against the principal. The present case differs from any of those which I have mentioned. Here the agent purchased the goods in his own name. The name of the principal was not then known to the seller, but it afterwards came to his knowledge. It seems to me to be more consistent with the general principle of law, that the seller shall have his remedy against the principal, rather than against any other person, to hold in this case that the seller, who knew that there was a principal, but did not know who that principal was, may resort to him as soon as he is discovered. Here the agent did not communicate to the seller sufficient information to enable him to debit any other individual. The seller was in the same situation, as if at the time of the contract he had not known that there was any principal besides the person with whom he was dealing, and had afterwards discovered that the goods had been purchased on account of another; and, in that case, it is clear that he might have charged the principal. It is said, that he ought to have ascertained by inquiry of the agent who the principal was, but I think that he was not bound to make such inquiry, and that by debiting the agent with the price of the goods, he has not precluded himself from resorting to the principal, whose name was not disclosed to him. It might have been made a question, whether it was not a defence to this action that the principal resided in Scotland. But that was not a point made at the trial, nor noticed in the bill of exceptions; we cannot, therefore, take it into our consideration. For the reasons already given, I think the plaintiff is entitled to recover.

Judgment affirmed.

PARKE, J., having been concerned as counsel in the cause, gave no opinion.

HEALD v. KENWORTHY.

(Court of Exchequer, 1855. 10 Exch. 739, 3 C. L. R. 612, 1 Jur. [N. S.] 70, 24 L. J. Exch. 76, 3 W. R. 176.)

Declaration for goods sold and delivered. Plea, that the goods were sold to the agent of defendant, to whom alone credit was given, and who was treated as a principal until after defendant had paid and settled with the agent. Demurrer and joinder.

POLLOCK, C. B. I am of opinion that the plea is bad. It comes shortly to this.—A person employs his agent to purchase goods for him, with authority to pledge his credit. The agent does so, and thus creates a debt; and I agree with the remark made by my Brother Parke, that all the cases in which the principal has been held to be discharged, are cases in which the seller has enabled the agent to misrepresent, or where the agent by some conduct adopted by the seller has placed his principal in a worse situation than that he ought to be in. This plea contains nothing of that sort. It merely states that the plaintiffs treated Taylor as the principal, and that the defendant bonâ fide settled with him.

PARKE, B. I am of the same opinion. The plea simply states, that, after the contract was entered into between the plaintiffs and a third party, the agent of the defendant, under circumstances which rendered the defendant liable upon it, the latter paid the agent. I am of opinion that this is no defence to the action. It is clear, that, if a person orders an agent to make a purchase for him, he is bound to see that the agent pays the debt; and the giving the agent money for that purpose does not amount to payment, unless the agent pays it accordingly. But there are no doubt cases and dicta, which, unless they be understood with some qualification, afford ground for the position taken by the counsel for the defendant. First, there is the dictum of Bayley, J., in Thomson v. Davenport, where that learned Judge lays down the rule, that "if the agent does make himself personally liable, it does not follow that the principal may not be liable also, subject to this qualification, that the principal shall not be prejudiced by being made personally liable, if the justice of the case is that he should not be personally liable." And he then proceeds to say, "if the principal has paid the agent, or if the state of accounts between the agent here and the principal would make it *unjust* that the seller should call on the principal, the fact of payment or such a state of accounts would be an answer to an action brought by the seller, where he had looked to the responsibility of the agent." The expression, "make it unjust," is very vague; but if rightly understood, what the learned judge said is, no doubt, true. If the conduct of the seller would make it unjust for him to call upon the buyer for the money; as for example, where the principal is induced by the conduct of the seller to pay his agent the money on the faith that the

agent and seller have come to a settlement on the matter, or if any representation to that effect is made by the seller either by words or conduct, the seller cannot afterwards throw off the mask and sue the principal. It would be *unjust* for him to do so. But I think that there is no case of this kind where the plaintiff has been precluded from recovering, unless he has in some way contributed either to deceive the defendant or to induce him to alter his position.[18] This was the ground of the decision in Wyatt v. The Marquis of Hertford, where the seller took the security of the agent unknown to the principal and gave the agent a receipt as for the money due from the principal, in consequence of which the principal dealt differently with his agent on the faith of such receipt, and it was properly held that the seller could not sue the principal. So in the case put by Lord Ellenborough, C. J., in Kymer v. Suwercropp, the observations of that learned Judge are perfectly correct; for the fact of the seller's allowing the time for payment to elapse might afford evidence of deceit on his part, and of his having thereby induced the principal to pay the agent. Neither does the case of Smyth v. Anderson, nor the elaborate judgment of my Brother Maule, contain anything at variance with the principle I have stated. He adopts the proposition expounded by Bayley, J., that the seller cannot recover against the principal, if it be unfair for him to do so. In Smyth v. Anderson, which contains a good illustration of this principle, the agent purchased goods on account of his principal who resided abroad; but at the time of the purchase, although he did not inform the seller who his principal was, the invoice stated that the goods "were bought on account of B.," the principal. The seller drew certain bills of exchange on the agent, who became insolvent before the bills arrived at maturity. The principal, after having received advice of the purchaser, and of the acceptance of the bills by the agent, made large remittances on account of the goods to the agent, who at the time of his stoppage was largely indebted to his principal. My Brother Maule says, the Court were of opinion that under such circumstances

[18] In Armstrong v. Stokes, L. R. 7 Q. B. 598, 41 L. J. Q. B. 253, 26 L. T. Rep. (N. S.) 872, 21 W. R. 52 (1872), the court preferred the dictum of Thomson v. Davenport to the rule of Heald v. Kenworthy, but in Irvine v. Watson, L. R. 5 Q. B. D. 414, 49 L. J. Q. B. 531, 42 L. T. Rep. (N. S.) 810 (1880), the court, after a deliberate consideration of the cases, preferred the rule that the undisclosed principal is discharged, upon payment to the agent, only when he is misled by some conduct of the third person into the belief that the agent had settled with the third person, and pays the agent in reliance upon such belief.

To the same effect is New York County Bank v. Stein, 24 Md. 447 (1866); Bonnell v. Briggs, 45 Barb. 470 (1866).

The contrary doctrine is approved in Harder v. Continental Card Co., 64 Misc. Rep. 89, 117 N. Y. Supp. 1001 (1909) (citing Laing v. Butler, 37 Hun, 144 [1885] and Knapp v. Simon, 96 N. Y. 284 [1884]); Fradley v. Hyland (C. C.) 37 Fed. 49, 2 L. R. A. 749 (1888).

As to what would be an injustice to the principal, see Smyth v. Anderson, 7 C. B. 21, 13 Jur. 41, 18 L. J. C. P. 109, 62 E. C. L. 21 (1849); Yenni v. Ocean Nat. Bank, 5 Daly, 421 (1874).

it was unfair and unjust to allow the seller to receive the value of the goods from the principal. I think that there is no authority for saying that a payment made to the agent, as in this case, precludes the seller from recovering from the principal, unless it appears that he has induced the principal to believe that a settlement has been made with the agent. There is no averment of that kind here, and consequently the plaintiffs are entitled to recover.

ALDERSON, B. I am of the same opinion. It is clear that the defendant, who is the principal in the transaction, authorized the agent to contract the debt on his account; the defendant afterwards paid his agent money, which, however, he did not pay over to the plaintiffs. Now the defendant is not excused from seeing that the plaintiffs are paid, unless the latter by their acts induced the defendant to make the payment to their agent. Where the seller trusts the agent only, and says that he will consider him as the only party liable, the agent alone is responsible, and the seller cannot proceed against the principal. But there must be some act on the part of the creditor to warrant us in saying that the payment by the debtor to his agent is to be treated as a payment to the creditor. Where a creditor by his conduct induces the debtor to pay a third party, and thereby alters his debtor's position, it would be *unjust* to call upon the debtor to pay the amount of the debt to the creditor. But there is nothing of that sort in this case, and consequently the defendant is not discharged.

Judgment for the plaintiffs.

(B) Contracts Under Seal

VAN DYKE v. VAN DYKE.

(Supreme Court of Georgia, 1905. 123 Ga. 686, 51 S. E. 582, 3 Ann. Cas. 978.)

Declaration on a note under seal payable to the order of plaintiff, and signed by E. A. Van Dyke, husband of defendant. The note was given for money borrowed by the maker, as plaintiff supposed for his own use. She afterward learned that it was used for paying an assessment on stock owned and since sold by defendant. On motion the court dismissed the action and plaintiff excepted.

LUMPKIN, J. [After stating the facts:] The general rule with reference to holding an undisclosed principal liable upon the contract of his agent is thus stated in Civ. Code 1895, § 3024: "If an agent fails to disclose his principal, yet, when discovered, the person dealing with the agent may go directly upon the principal, under the contract, unless the principal shall have previously accounted and settled with the agent." This is a codification of the law as it stood prior to the original Code of 1863, and is not an innovation resulting from legislative enactment. In Lenney v. Finley, 118 Ga. 718, 45 S. E. 593, it

was held that: "The rule that an undisclosed principal shall stand liable for the contract of his agent does not apply when the contract is under seal. Accordingly, a lease, under seal, executed by an agent as lessee in his individual name, and which does not purport to be executed on behalf of the principal, is not binding upon the latter, although it appears from extrinsic evidence that the lessee was the general agent to conduct a business for his principal, and that the premises were leased to be used in such business." We are asked to review and reverse this decision, but the court declines to change the ruling then made. An examination of the authorities cited in the opinion will show that it was not without foundation. In Merchants' Bank v. Central Bank, 1 Ga. 418, 44 Am. Dec. 665, ante, p. 460, it was said: "In the execution of instruments under seal by an agent the general rule is that it must purport upon its face to be the contract of the principal, and his name must be inserted in it, and signed to it." See, also, Compton v. Cassada, 32 Ga. 428 (compare Tenant v. Blacker, 27 Ga. 418; as to the execution of a power, see Terry v. Rodahan, 79 Ga. 278, 5 S. E. 38, 11 Am. St. Rep. 420); Graham v. Campbell, 56 Ga. 258. In 1 Am. & Eng. Enc. L. (2d Ed.) 1141, it is said: "It has been laid down as a common-law doctrine that, when a contract is made by an instrument under seal, no one but a party to the instrument is liable to be sued upon it, and therefore, if made by an agent or attorney, it must be in the name of the principal, in order that he may be a party, because otherwise he is not bound by it. * * * Some of the later decisions, however, qualify this doctrine by holding that when a sealed contract has been executed in such form that it is in law the contract of the agent, and not of the principal, but the principal's interest in the contract appears upon its face, and he has received the benefit of the performance by the other party, and has ratified and confirmed it by acts in pais, and the contract is one which would have been valid without a seal, the instrument will be binding on the principal." In the note attached to the declaration there is nothing to indicate that it was executed by Van Dyke as agent, or that his wife was in any way connected with it. Indeed, no reference to her or to any agency is made in the paper. See Briggs v. Partridge, 64 N. Y. 357, 21 Am. Rep. 617; Mechem on Agency, §§ 701, 702, and note; Clark on Contracts, § 275, p. 519; Bishop on Contracts, §§ 426, 1070; Evans v. Wells & Spring, 22 Wend. 324—in which several interesting opinions were filed. Some courts hold that negotiable instruments do not fall within the general rule, and that an unnamed principal cannot be sued on them. See Clark on Contracts, § 275, p. 519 and notes.

It is contended that the rule applies only to instruments which were specialties at common law, as to which a seal was necessary; and that in cases where the instrument would be valid without a seal the addition of a seal would not bring it within the rule. There are some authorities holding or tending to hold this to be the rule. See

Stowell v. Eldred, 39 Wis. 614; Wagoner v. Watts, 44 N. J. Law, 126; Shuetze v. Bailey, 40 Mo. 69, 75. The distinction drawn in this line of authorities, however, has not been followed in Georgia. In the case of Lenney v. Finley, supra, the instrument under consideration was a lease for a term less than two years, which, under our law, conveyed no interest in land, and could have been executed without any seal. In Rowe v. Ware, 30 Ga. 278, it was held that "the signature of a sealed instrument by an agent, the principal not being present, is not binding on the principal, unless the authority of the agent be under seal." In the body of the opinion it is said: "But it was said that the bond need not have been under seal, though in point of fact it was so, and therefore the seal might be disregarded. Not so. The question was whether Taylor had authority to sign the names of Hooks and Herndon to this bond as it is—sealed as it is. Whether a bond without a seal (to use, for convenience, a short but inaccurate phrase) would be valid has nothing to do with the case, for there was no such paper in the case." This was reaffirmed in Overman v. Atkinson, 102 Ga. 750, 29 S. E. 758.

It is further contended that a note under seal does not fall within this rule. At common law a note under seal was unknown. Such an instrument more nearly approximated a "single bond." Broom's Common Law (9th Ed.) 272, 484; Sivell v. Hogan, 119 Ga. 170, 46 S. E. 67. It is unnecessary to discuss the exact status of a sealed note. In Albertson v. Holloway, 16 Ga. 377, its nature was considered, and it was held that a plea of failure of consideration could be made to a suit based on it. In other cases there have been intimations that a presumption of a consideration arose from the presence of a seal, but that it might be rebutted. See Neil v. Bunn, 58 Ga. 583; Simms v. Lide, 94 Ga. 553, 21 S. E. 220. In Weaver v. Cosby, 109 Ga. 310, 34 S. E. 680, Mr. Justice Lewis said that an instrument then before the court, being under seal, "raised a strong presumption of law" that it was founded upon a consideration. In Sivell v. Hogan, 119 Ga. 167, 169, 170, 46 S. E. 67, the opinion was strongly expressed, although no direct ruling was made, that a seal raises a conclusive presumption of the existence of a consideration at the time the contract was entered into, but not that it has not since failed, either wholly or partially; and, accordingly, that want of consideration cannot be pleaded, but failure of consideration may be. Whether the presumption thus raised is disputable or conclusive, the fact of being under seal gives to the note a character which it would not have otherwise. Moreover, the statute of limitations in regard to a note under seal and one without a seal is not the same. Civ. Code 1895, §§ 3765, 3767. Section 3634 of the Civil Code of 1895 reads as follows: "A specialty is a contract under seal, and is considered by the law as entered into with more solemnity, and consequently

of higher dignity, than ordinary simple contracts." Under the strict commercial law prevailing in some jurisdictions, a note under seal and payable to a named person or order is deemed not negotiable, but in this state it is treated as negotiable. Farrar v. Bank of New York, 90 Ga. 331, 17 S. E. 87; Porter v. McCollum, 15 Ga. 528. It is apparent that a note under seal occupies a different position in several respects from one which is not so. Hence it is not to be treated merely as a simple contract, and the seal rejected as surplusage. We think it does fall within the rule announced in Lenney v. Finley, supra. From what has been said it follows the plaintiff could not have recovered against the defendant on the note given by the husband of the latter.[19]

It is contended, however, that, whether the plaintiff can recover on the note or not, she has a cause of action against the defendant aside from the note, under the facts alleged. The case of Farrar v. Lee, 10 App. Div. 130, 41 N. Y. Supp. 672, was very similar to that now under consideration. It is there said: "That the liability rested entirely upon the bond, in which any preliminary contract was merged; that, as the bond was signed by Tanner [the agent] in his own name, and not as agent for Lee [the principal], it was not competent to transfer by parol evidence, or in any other way, from Tanner to Lee, the obligation which Tanner had assumed personally." In the case of Lenney v. Finley, supra, it was contended that, if the concealed principal was not liable on the contract of lease by reason of its being under seal, nevertheless, having occupied the premises and used them for the purpose of conducting business, she was liable to the plaintiff. This contention was denied by the court. In the case of Maddox v. Wilson, 91 Ga. 39, 16 S. E. 213, no opinion was written. The third headnote appears to conflict with the ruling here made. The decision was made by two justices, and not by a full bench, and was disapproved in Lenney v. Finley, supra.

Under the allegations of the petition the trial court committed no error in sustaining the demurrer. Judgment affirmed. All the Justices concurring, except SIMMONS, C. J., absent.

[19] Accord: Briggs v. Partridge, 64 N. Y. 357, 21 Am. Rep. 617 (1876); Furculi v. Bittner, 69 Misc. Rep. 112, 125 N. Y. Supp. 36 (1910).

As to the effect of statutes dispensing with the necessity of seals, see Jones v. Morris, 61 Ala. 518 (1878), and Sanger v. Warren, 91 Tex. 472, 44 S. W. 477, 66 Am. St. Rep. 913 (1898), holding that they have no effect upon this rule, and Streeter v. Janu, 90 Minn. 395, 96 N. W. 1128 (1903), holding that the Minnesota statute has abolished all differences between simple contracts and specialities.

Some cases hold that though an action does not lie against the principal upon a bond in the agent's name, yet assumpsit lies, and the writing may be introduced as evidence of the terms of the contract. Violett v. Powell, 10 B. Mon. 347, 52 Am. Dec. 548 (1850); Moore v. Granby Min. Co., 80 Mo. 86 (1883).

(C) Negotiable Instruments

WEBSTER v. WRAY.

(Supreme Court of Nebraska, 1886. 19 Neb. 558, 27 N. W. 644, 56 Am. Rep. 754.)

Action against E. D. Webster on four contracts made by his son, Thomas B., in his own name, in connection with the business of a cattle ranch owned by defendant, but run in the name of his son. In 17 Neb. 579, 24 N. W. 207, the judgment for plaintiff was affirmed. It now comes up on a rehearing.

COBB, J.[20] * * * The point upon which the rehearing was allowed, and upon which we think the case turns, is that while in the case of contracts, generally, where one of the persons executing the same executes it in his own name, without disclosing any one as his principal or his own character as an agent, if in point of fact he was acting as the agent of another party, such other party will be held to be the real party to the contract, yet that this rule does not apply to negotiable promissory notes. This question was ably argued at the bar, as well as by exhaustive briefs by counsel on either side. An examination of the authorities cited by counsel, with others referred to therein, led us all, at the consultation, to the conclusion that the above proposition as to both its branches expresses the law correctly. Being about to enter upon a collation of authorities upon this point of the non-liability of an unnamed principal upon negotiable paper, my attention was attracted to a citation on page 284, 1 Daniel, Neg. Inst., to an article in 13 Alb. Law J. No. 19, May 6, 1876, p. 323. This article I find so exhaustive of the subject that I will content myself by giving the conclusions of the writer, and the authorities by him cited. Says our author: "But as to bills of exchange and promissory notes, it has been long settled that he who takes negotiable paper contracts with him who, on its face, is a party thereto, and with no other person. By Lords Abinger and Parke, Beckham v. Drake, 9 Mees. & W. 92, 96; Byles, Bills, 37; Story, Bills, § 76; Edw. Bills, 80." Hence evidence is not admissible to charge any other person thereon upon the grounds of his having been the copartner or principal of the party named. Metc. Cont. 108; Draper v. Massachusetts Steam-heating Co., 5 Allen, 340. The rule is general, if not universal, that neither the legal liability of an unnamed principal to be sued, nor his legal right to sue on a negotiable instrument, can be shown by parol evidence (Fuller v. Hooper, 3 Gray, 334, per Metcalf, J.), even as between the immediate parties to the transaction, and although an agency is disclosed upon the face of the instrument,

[20] Part of the opinion is omitted.

where the word "agent" or something equivalent is added to the signature of the party signing the instrument. See cases below.

The rule excluding all parol evidence to charge an unnamed principal as a party to negotiable paper is not placed upon the ground that such evidence would contradict or alter the instrument; but this exception to the general rule which governs other parol (or unsealed) agreements is derived from the nature of negotiable paper, which being made for the purpose of being transferred from hand to hand, and of giving to every successive holder as strong a claim upon the maker as the original payee had, must indicate on its face who the maker is; for any additional liability of the principal not expressed in the form of such a note or bill would not be negotiable.[21] Barlow v. Congregational Soc., 8 Allen, 460. As between the unnamed principal and a subsequent holder, the reason for the rule in question seems perfectly clear and satisfactory; but, as between the immediate parties to the transaction, does the reason for its application exist? For example: An agent purchases goods; discloses the name of his principal; and, having express authority, gives the vendor a negotiable promissory note for the price, signing it with his own name alone without any addition, or, let us say, with the addition of the word "agent," to his signature—in such a case it is held that the payee cannot recover against the principal upon the instrument, because it is negotiable and his name is not disclosed upon it. But what material difference does it make whether the instrument is negotiable, when it has not been negotiated? But it must be confessed that the weight of authority, if not of reason, is in favor of the rule excluding all parol evidence, even as between the immediate parties to the transaction. It is held that although the party executing the instrument describes himself as "agent," yet, if the name of the principal is not disclosed upon the face of it, all evidence dehors the instrument, for the purpose of holding him thereon, is to be excluded. It is wholly immaterial, therefore, that the agent had full authority to make it in behalf of his principal; that the consideration was exclusively received for his benefit; that the plaintiff knew the agent's principal, and accepted the note as the promise of the principal. Williams v. Robbins, 16 Gray, 77, 77 Am. Dec. 396; Slawson

[21] A negotiable instrument "is a 'courier without baggage,' whose countenance is its passport," quoted in Heaton v. Myers, 4 Colo. 59 (1877), and in Sparks v. Dispatch Transp. Co., 104 Mo. 531, 15 S. W. 417, 12 L. R. A. 714, 24 Am. St. Rep. 351 (1891), in which is an illuminating review of the authorities.

The distinction between such cases and cases in which the principal adopted the agent's name as his business soubriquet is discussed in Brown v. Parker, 7 Allen, 337 (1863). A recovery on the common counts of a debt evidenced by a bill of exchange was allowed in Thurston v. Mauro, 1 G. Greene (Iowa) 231 (1848), and in Kenyon v. Williams, 19 Ind. 44 (1862), it was held there might be relief in equity. See, also, Chem. Nat. Bank v. City Bank, 156 Ill. 149, 40 N. E. 328 (1895) (recovery in assumpsit); Harper v. Tiffin Nat. Bank, 54 Ohio St. 425, 44 N. E. 97 (1896).

v. Loring, 5 Allen, 340, 81 Am. Dec. 750. See, also, Stackpole v. Arnold, 11 Mass. 27, 6 Am. Dec. 150; Brown v. Parker, 7 Allen, 337; Bedford Com. Ins. Co. v. Covell, 8 Metc. 442; Bass v. O'Brien, 12 Gray, 477; Pentz v. Stanton, 10 Wend. 271, 25 Am. Dec. 558; Thurston v. Mauro, 1 G. Greene, 231; Kenyon v. Williams, 19 Ind. 45; Anderton v. Shoup, 17 Ohio St. 125; Taber v. Cannon, 8 Metc. 456; Eastern R. Co. v. Benedict, 5 Gray, 561, 66 Am. Dec. 384; Bank of America v. Hooper, 5 Gray, 567, 66 Am. Dec. 390; De Witt v. Walton, 9 N. Y. 571; Tucker Mfg. Co. v. Fairbanks, 98 Mass. 101.

No fault can be found with the opinion and decision of the court, so far as the second and fourth causes of action are concerned; but in regard to the first and third causes of action, we fail to distinguish between simple contracts in general and negotiable paper.

Upon reargument and reconsideration of the authorities, we reach the conclusion that the district court erred in admitting evidence. * * * The judgment of the district court is therefore reversed, and the cause remanded for further proceedings in accordance with law.

(D) Election to Hold Principal or Agent

GREENBURG v. PALMIERI.[22]

(Supreme Court of New Jersey, 1904. 71 N. J. Law, 83, 58 Atl. 297.)

VAN SYCKEL, J. This is a suit instituted in the Second District court of Newark against the wife for supplies purchased by her husband for horses owned by her. The plaintiff, before this suit was brought, sued the husband, and recovered a judgment for the same claim. After judgment against the husband, the plaintiff learned that the husband, in making the purchases, acted as the agent of his wife in her business, and then this suit was commenced. From the judgment recovered against the wife, the case is in this court by appeal.

In Elliott v. Bodine, 59 N. J. Law, 567, 36 Atl. 1038, Judge Nixon, in delivering the opinion of the court of last resort, says: "Where credit is given to an agent, the fact of agency being unknown at the time, the party giving credit may elect which he will hold responsible, the principal or the agent; and that a husband may act as the agent of his wife."

In Yates v. Repetto, 65 N. J. Law, 294, 47 Atl. 632, Judge Adams, in expressing the views of the Court of Errors and Appeals, says: "The authorities are uniform in maintaining the doctrine that, when the principal is unknown to the vendor at the time of the sale, he may, upon discovering the principal, resort to him, or to the agent with whom he dealt, at his election."

To make an election binding, the party electing must have infor-

[22] Accord: Raymond v. Crown Mills, 2 Metc. (Mass.) 319 (1841).

mation of the name of the principal, in addition to the fact of the agency, for in the absence of such knowledge there could not be an election. In this case the plaintiff had notice neither of the agency nor of the name of the principal.

If the plaintiff sues after he is advised of the agency, it is an election, from which he cannot recede; but where, as in this case, he recovers a judgment against the agent when he is in ignorance of the existence of a principal, an action will lie against the principal, unless he discharges the judgment against the agent. Story on Agency, § 296; Mechem on Agency, §§ 695–700; Beymer v. Bonsall, 79 Pa. 298.

The judgment below should be affirmed, with costs.

TUTHILL v. WILSON.

(Court of Appeals of New York, 1882. 90 N. Y. 423.)

Plaintiff sold Robin's island to one McNish, as agent for one Scott. They assigned to Horne, to whom plaintiff conveyed the property, subject to certain mortgages, and took payment, part cash and part by bond and mortgage back. Horne conveyed to Mrs. Moffett. The bond was not paid, and plaintiff foreclosed the mortgage and charged a deficiency of $4,660.62 against Mrs. Moffett. Execution was issued and returned unsatisfied, and plaintiff now sues Wilson, as being all the time the real principal and purchaser of Robin's island.

FINCH, J.[28] * * * Besides the plaintiff dealt with Horne and his grantee, Mrs. Moffett, as real principals, and actual owners and purchasers of the island, and in such utter disregard and repudiation of any rights of Wilson, after notice of his claim to be owner, as to estop him now from treating him as principal. The appellant's idea seems to be that Wilson's alleged contract of purchase somehow survived its subsequent fulfillment, and having been made by agents acting for an undisclosed principal, the seller had a remedy against both; could sue the agents as he did, and failing to get satisfaction have a remedy against the discovered principal. We do not see how the facts of the case admit of any such proposition; but if they do, if it were possible to say that a right of action for the unpaid purchase-money of the land remained to Tuthill, against Horne and Mrs. Moffett as agents who had become personally liable, and also against Wilson as the undisclosed principal, a fatal difficulty remains. The vendor could not enforce his claim against both the principal when discovered and the agents who contracted in his behalf. Granting that each was liable, both were not, for both could not be at one and the same time, since the contract could not be the personal con-

[28] Part of the opinion is omitted.

tract of the agents, and yet not their contract but that of the principal. The vendor had a choice and was put to his election. Meeker v. Claghorn, 44 N. Y. 351; Addison v. Gandassequi, 4 Taunt. 574; Curtis v. Williamson, L. R., 10 Q. B. 57. The rule is well stated in Leake's Digest, 503–4, that "if, after discovery of the principal, the creditor elect to hold the agent liable, and act accordingly in a manner to affect the principal, he will be precluded from afterward charging the principal. He has the right of election as to which of them he will hold responsible, but having once made an election he is bound by it." In the present case the learned trial judge found as a fact that in July, 1873, the plaintiff had notice that Wilson claimed to be the real owner of Robin's island. Yet after that, he took from Mrs. Moffett a further mortgage; knowing the real principal, he began a foreclosure of the agents' mortgage; he asked a personal judgment both against Horne and Mrs. Moffett; he omitted to make the principal a party; he released Horne from his liability; pursued Mrs. Moffett to judgment and execution; and became repossessed of Robin's island by virtue of his judgment. By these acts he made his election to treat the agents as principals, as he had the right to do, and cannot now recall his choice. It was said in Priestly v. Fernie, 3 H. & C. 982, that "where the agent, having made a contract in his own name, has been sued on it to judgment, there can be no doubt that no second action would be maintainable against the principal." The plaintiff wholly ignored Wilson in pursuing his remedy, as he had a right to do. He treated the agents as principals, and they were such as to him and on the face of the papers. He cannot now have a remedy against Wilson.[24] We are unable to discover

[24] But in Gay v. Kelley, 109 Minn. 101, 123 N. W. 295, 26 L. R. A. (N. S.) 742 (1909), the court holds that if the agency is disputed the third person may maintain suit against both principal and agent until it is disclosed who is liable, though he cannot have judgment against both. Contra, see Furcuil v. Bittner, 69 Misc. Rep. 112, 125 N. Y. Supp. 36 (1910); Weil v. Raymond, 142 Mass. 206, 7 N. E. 860 (1886). As to why the remedies against principal and agent are inconsistent, see Eufaula Grocery Co. v. Mo. Nat. Bank, 118 Ala. 408, 24 South. 389 (1898), and especially the leading English cases, Priestly v. Fernie, 3 H. & C. 977, 11 Jur. (N. S.) 813, 34 L. J. Exch. 172, 13 L. T. Rep. (N. S.) 208, 13 W. R. 1089 (1865), and Kendall v. Hamilton, 4 App. Cas. 504, 48 L. J. C. P. 705, 41 L. T. Rep. (N. S.) 418, 28 W. R. 97 (1879). Cf. Curtis v. Williamson, L. R. 10 Q. B. 57, 44 L. J. Q. B. 37, 31 L. T. Rep. (N. S.) 678, 23 W. R. 236 (1874), in which filing an affidavit of proof against the estate of an insolvent debtor was held not as matter of law an election. The election must be made within a reasonable time. Gay v. Kelley, supra. A delay of three months is not as matter of law unreasonable "in the absence of any altering for the worse" of the position of the principal. Berry v. Chase, 179 Fed. 426, 102 C. C. A. 572 (1910). A delay of nine months is too long, especially if the position of the principal towards his agent has been altered before the action is brought. Smethurst v. Mitchell, 1 E. & E. 622, 5 Jur. (N. S.) 978, 28 L. J. Q. B. 241, 7 W. R. 226, 102 E. C. L. 622 (1859). A reasonable time to investigate and compare the standings of principal and agent is always allowed. Barrell v. Newby, 127 Fed. 656, 62 C. C. A. 382 (1904), and there seems to be no reason why the principal should complain in any case if he has not altered his position with the agent. Campbell v. Hicks, 28 L. J. Exch. 70 (1858).

any ground upon which a recovery for the deficiency on the foreclosure can be sustained against Wilson. * * *

Judgment for defendant affirmed.

LINDQUIST v. DICKSON.

(Supreme Court of Minnesota, 1906. 98 Minn. 369, 107 N. W. 958, 6 L. R. A. [N. S.] 729, 8 Ann. Cas. 1024.)

START, C. J.[25] Action to recover from the defendant, as an undisclosed principal, for labor and material performed and furnished by the plaintiff in decorating and repairing her house, pursuant to an alleged contract made for her by her husband, Joseph M. Dickson.

The complaint alleged, in effect, that at the time the contract was entered into with the husband he was in fact acting as agent for his wife, the defendant, but he failed to disclose to the plaintiff the fact of such agency, or the fact that she was the real party in interest and owned the house, the decorating and improvement of which was the subject-matter of the contract; that the plaintiff performed the contract on his part; that he was not paid therefor; and that he commenced an action against the husband to recover the balance due him on the contract, and on August 29, 1904, he recovered judgment against him for the sum of $273.68, no part of which has been paid; and further that thereafter (in the month of October, 1904) the plaintiff learned for the first time that the defendant was the real party in interest, and that the contract was made for her by her husband as her agent. This action was commenced in the month of June, 1905. The defendant by her answer denied that she ever made the contract alleged in the complaint, and alleged as a defense the recovery of a judgment by the plaintiff against her husband, Joseph M. Dickson. The trial resulted in a verdict in favor of the plaintiff for the amount stated, and the defendant appealed from an order denying her motion for a new trial.

1. The first group of alleged errors to be considered is to the effect that there was no evidence to support the verdict, because there was no evidence that the husband of the defendant was her agent and acted as such in making the contract in question, and further that there was no evidence that the plaintiff relied upon such supposed agency in making the contract, but, on the contrary, that he dealt with the husband as principal. It is not controverted that the plaintiff, at the time the contract was made, understood that the house he was to decorate and improve belonged to the husband, and that he was dealing with him as principal, and further that he recovered

[25] Part of the opinion is omitted.

judgment against the alleged agent upon the same claim which is the basis of this action, in ignorance of such alleged agency. It is the contention of the defendant that such judgment is a bar to this action.

The general rule is that, where a simple contract, by parol or writing, is made by an authorized agent without disclosing his principal, and the other contracting party subsequently discovers the real party, he may abandon his right to look to the agent personally and resort to the principal. Lindeke Land Co. v. Levy, 76 Minn. 364, 79 N. W. 314. But whether the creditor can proceed against the undiscovered principal, after he has obtained a judgment on his claim against the agent, is a question as to which the adjudged cases are conflicting.

In the case of Kingsley v. Davis, 104 Mass. 178, the creditor, after being fully informed that the party with whom he made the contract was acting for an undiscovered principal, brought an action against the agent and recovered judgment for his claim. Afterwards he brought an action against the principal to recover for the same claim, and the court held that the action against the principal could not be maintained for the reason that: "The general principle is undisputed that, when a person contracts with another who is in fact an agent of an undiscovered principal, he may upon the discovery of the principal resort to him or to the agent with whom he dealt at his election. But if, after having come to a knowledge of all the facts, he elects to hold the agent, he cannot resort to the principal." In Beymer v. Bonsall, 79 Pa. 298, it was held that nothing short of satisfaction of the judgment against the agent would discharge the principal. The case of Kingsley v. Davis suggests the true basis for solving the question. It is a question of election. Election implies full knowledge of the facts necessary to enable a party to make an intelligent and deliberate choice. Pederson v. Christopherson, 97 Minn. 491, 106 N. W. 958.

We therefore hold upon principle, and what seems to be the weight of judicial opinion, that: If a person contracts with another, who is in fact an agent of an undisclosed principal, and, after learning all the facts, brings an action on the contract and recovers judgment against the agent, such judgment will be a bar to an action against the principal. But an unsatisfied judgment against the agent is not a bar to an action against the undiscovered principal when discovered, if the plaintiff was ignorant of the fact as to the agency when he prosecuted his action against the agent. Kingsley v. Davis, 104 Mass. 178; Steel-Smith Grocery Co. v. Potthast, 109 Iowa, 413, 80 N. W. 517; Coleman v. Bank, 53 N. Y. 388; Wharton on Agency, § 472; 1 Enc. of Law, 1139; Mechem on Agency, § 699.[26] * * *

Judgment affirmed.

[26] An action pursued to judgment after knowledge of all the facts is in law an election. Kingsley v. Davis, 104 Mass. 178 (1870); Murphy v. Hutchinson, 93 Miss. 643, 48 South. 178, 21 L. R. A. (N. S.) 785, 17 Ann. Cas. 611 (1909), containing a discriminating discussion of the cases. But there must

SECTION 2.—FOR THE TORT OF THE AGENT

HERN v. NICHOLS.

(Court of King's Bench at Nisi Prius, 1708. 1 Salk. 289.)

In an action on the case for a deceit, the plaintiff set forth, that he bought several parcels of silk for ——— silk, whereas it was another kind of silk; and that the defendant, well knowing this deceit, sold it to him for ——— silk. On trial, upon not guilty, it appeared that there was no actual deceit in the defendant who was the merchant, but that it was in his factor beyond sea. And the doubt was, If this deceit could charge the merchant? And HOLT, C. J., was of opinion, that the merchant was answerable for the deceit of his factor, though not criminaliter, yet civiliter; for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger. And upon this opinion the plaintiff had a verdict.

have been full power of choosing between principal and agent. Hoffman v. Anderson, 112 Ky. 893, 67 S. W. 49, 24 Ky. Law Rep. 44 (1902).

It is not necessary that the judgment shall have been satisfied. Barrell v. Newby, 127 Fed. 656, 62 C. C. A. 382 (1904), disapproving on this point Beymer v. Bonsall, 79 Pa. 298 (1875).

What amounts to an election is well discussed in Berry v. Chase, 102 C. C. A. 572, 179 Fed. 426 (1910), in which it is said by Knappen, J.: "In our opinion the evidence was not sufficient to establish an election by Berry & Co. to look to either Chase or the brokerage firm, to the exclusion of the other. On the one hand, although the instrument of assignment in terms conveys an account against Schloss, Miller & Malone, any inference from this fact is overcome by an express authorization of suit against any undisclosed principal. On the other hand, the testimony as to Berry & Co.'s treatment of the account, following the conversation by telephone, was manifestly no more than a conclusion of the witness, and incompetent as evidence. While any decisive act by a party, after knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies (Robb v. Vos, 155 U. S. 13, 15 Sup. Ct. 4, 39 L. Ed. 52), yet an act to have the effect of election must be decisive. The mere act of charging the agent, after knowledge of an originally undisclosed principal, does not, as matter of law, amount to an election to look only to the agent. Jones v. Johnson, 86 Ky. 530, 6 S. W. 582. It has been held, for manifest reasons, that the bringing of suit against both the agent and his originally undisclosed principal does not constitute an election to hold the principal and discharge the agent. Mattlage v. Poole, 15 Hun, 556. Whether or not the mere bringing of suit against the agent, without proceeding to judgment, would amount to an election to look to the agent (a proposition upon which the authorities are not entirely agreed), there was here no suit against the agent, nor was there any overt act in our opinion inconsistent with the right of Berry & Co. to ultimately look to Chase. It is urged that the delay in electing to sue Chase was unreasonable. We cannot say this is so, in the absence of any altering for the worse of Chase's position towards Schloss, Miller & Malone, or of any circumstance making the holding of Chase unjust or unreasonable."

BIRKETT v. POSTAL TELEGRAPH CABLE CO.

(Supreme Court of New York, Appellate Division, Fourth Department, 1905. 107 App. Div. 115, 94 N. Y. Supp. 918, affirmed 186 N. Y. 591, 79 N. E. 1101.)

One Harrington, agent and manager of defendant company at Penn Yan, had systematically overcharged plaintiff for telegrams and appropriated the excess amounts to his own account to the extent of $2,480.24. The agent confessed and absconded. Birkett now sues the company to recover the overcharges.

SPRING, J. The rule of law governing this case is elementary. A principal is liable to a third person for the misconduct of his agent committed in the line of his employment, even though the offense was in excess of his authority, "and the principal did not authorize, justify, or know of it." Nowack v. Met. St. Ry. Co., 166 N. Y. 433–440, 60 N. E. 32, 54 L. R. A. 592, 82 Am. St. Rep. 691; Jarvis v. Manhattan Beach Co., 148 N. Y. 652–657, 43 N. E. 68, 31 L. R. A. 776, 51 Am. St. Rep. 727 et seq.

Conceding this rule of law, the appellant contends that Harrington was not in the line of his employment in making false entries in the accounts rendered to the plaintiff. Harrington had general superintendence of the defendant's office in Penn Yan. He had the exclusive handling of its funds at that village. He was charged with the rendition of the accounts to the plaintiff, and with collecting for the telegrams and cablegrams sent by the plaintiff and upon which there were charges for transmission. He was acting within the scope of his agency in receiving the money for the benefit of the defendant. If the plaintiff had paid the exact amount due, and Harrington had misappropriated it, the plaintiff could not have been compelled to respond over again on account of the misconduct of Harrington. Of course, Harrington was not authorized to collect money of the plaintiff for telegrams never transmitted; but it was his duty to collect the sums actually due for their transmission. If he collected more than was due, he did that because of his agency. The agent, in his dealings with the plaintiff, turned out to be dishonest while acting in that capacity. His delinquency does not exonerate the defendant to the plaintiff, who relied upon the manifest authority of Harrington. The principal cannot so easily evade liability for the misdeeds of its agent. The general line of employment is fixed by the agency, and in whatever an agent does to an innocent third person within that general line, although ultra vires, he represents his principal.[27] If

[27] The rule applies even though the principal forbade the acts, or disapproved of them, provided they were within the course of his employment. Philadelphia & R. R. Co. v. Derby, 14 How. 468, 14 L. Ed. 502 (1852); Rhomberg v. Avenarius, 135 Iowa, 176, 112 N. W. 548 (1907); Dupre v. Childs, 52 App. Div. 306, 65 N. Y. Supp. 179 (1900). It applies in case of trespass by the agent, Moir v. Hopkins, 16 Ill. 313, 63 Am. Dec. 312 (1855), to his frauds, Chetwood v. Berrian, 39 N. J. Eq. 203 (1884); Barwick v. English Joint Stock

a conductor uses undue violence in removing a passenger from a train, the railroad company is liable. The company does not authorize the conductor to handle the passenger harshly; but it does empower him in certain cases to eject the passenger, and it must be held civilly responsible for whatever the conductor does in carrying out the authority intrusted to him, even though he oversteps his instructions. The rule here applicable is founded on the old maxim that the principal is responsible for his agent, not the innocent third person.

The plaintiff was furnished with the tariff books of the defendant, and by examination of each statement with the tariff rates could have ascertained that he was being cheated. It is urged that he was negligent in failing to make these examinations, and should not, therefore, be permitted to recover. The plaintiff was not obliged to act on the assumption that Harrington was defrauding him. The defendant had placed its agent in the responsible position of manager of its business. It vouched for his integrity to its patrons. They had a right to assume he was honest, and were not called upon to enter into any inspection of the items of his accounts, for the purpose of discovering either fraud or mistake. The judgment should be affirmed, with costs.

Judgment affirmed, with costs. All concur.

Bank, L. R. 2 Exch. 259, 36 L. J. Exch. 147, 16 L. T. Rep. N. S. 161, 15 W. R. 877 (1867), to conversion of the property of the third person, Rhomberg v. Avenarius, supra, to a libel against the third person, Citizens' Life Assur. Co. v. Brown, A. C. 423, 73 L. J. P. C. 102, 90 L. T. Rep. (N. S.) 739, 20 T. L. R. 497, 53 W. R. 176 (1904). As to liability of the principal for slanders uttered by the agent, see Singer Mfg. Co. v. Taylor, 150 Ala. 574, 43 South. 210, 9 L. R. A. (N. S.) 929, 124 Am. St. Rep. 90 (1906), as to his neglect, deceit, or other wrongful act, Locke v. Stearns, 1 Metc. (Mass.) 560, 35 Am. Dec. 382 (1840), per Shaw, C. J., limiting it however to the civil, and not the criminal liability of the principal, as do the cases generally. See Higgins v. Watervliet Turnpike Co., 46 N. Y. 23, 7 Am. Rep. 293 (1871); Bank of Palo Alto v. Pac. Postal Tel. Cable Co. (C. C.) 103 Fed. 841 (1900), and even to crimes in which intent is not an ingredient, such as illegal sale of liquors. George v. Gobey, 128 Mass. 289, 35 Am. Rep. 376 (1880). Where, however, the principal does not participate in the tort, he is not liable in punitive damages. Maisenbacker v. Soc. Concordia, 71 Conn. 369, 42 Atl. 67, 71 Am. St. Rep. 213 (1899).

Modern cases extend the rule to willful and malicious acts of the agent. Cf. Johnson v. Barber, 10 Ill. 425, 50 Am. Dec. 416 (1849) (as to malice), and Pressley v. Mobile & G. R. Co. (C. C.) 15 Fed. 199, 4 Woods, 569 (1882). For an interesting account of the historical development of the tort liability of the principal for the acts of the agent, and of the principle upon which it rests, see Kingan & Co. v. Silvers, 13 Ind. App. 80, 37 N. E. 413 (1894).

MACKAY v. COMMERCIAL BANK OF NEW BRUNSWICK.

(Privy Council Appeals, 1874. L. R. 5 P. C. 394, 43 L. J. P. C. 31, 30 L. T. Rep. [N. S.] 180, 22 W. R. 473.)

Lingley, a timber merchant of New Brunswick, was accustomed to consign cargoes to Messrs. Mackay of Liverpool, drawing bills on them which he indorsed to defendant bank. In August, 1888, he drew several bills, two of which, by his fraud, were not drawn on any cargoes. On receiving his letter of notification, plaintiffs cabled him to remit defendant's guarantee of the bills, or they would refuse all. When the message arrived, Lingley had made over all his property to trustees and absconded. The message was taken to Sancton, cashier and manager of the defendant, who cabled back, "Sent last mail.—Lingley." The Mackays being thus deceived, paid the bills, and now bring deceit against the bank. Verdict directed for plaintiff, new trial granted by the Supreme Court of New Brunswick, from which this appeal is taken.

Sir MONTAGUE E. SMITH [28] delivered the judgments of their Lordships: * * * The Court appear to treat the question whether or not Sancton was acting within the scope of his authority (there being no conflicting evidence as to the general nature of his authority) as a question of law, and hold that Mr. Justice Weldon, instead of directing the jury that the sending of the telegram was within the scope of Sancton's authority, ought to have directed them that it was not. The only question of fact which they direct to be submitted to the jury is, whether or not the sending it was sanctioned by the directors.

Their Lordships regard it as settled law that a principal is answerable where he has received a benefit from the fraud of his agent, acting within the scope of his authority. This doctrine has been laid down by Lord Holt in Hern v. Nichols, 1 Salk. 289, supra, p. 760; by Lord Ellenborough in Alexander v. Gibson, 2 Camp. 355; by Parke, B., in Cornfoot v. Fowke, 6 M. & W. 373, although, under the peculiar circumstance of that case, he held the defendant not liable; also by Parke, B., in Moens v. Heyworth, 10 M. & W.; by Tindal, C. J., delivering the judgment of the Exchequer Chamber in Wilson v. Fuller, 3 Q. B. 77; and again by the Court of Exchequer in Udell v. Atherton, 7 H. & N. 172, 30 L. J. Ex. 317, where, it is true, the Court was divided in its judgment, but where Baron Martin, who held that the plaintiff had not proved his case, stated the question to be, "Was the agent's situation such as to bring the representation he made within the scope of his authority?"

There are, however, some cases to be found apparently at variance as to the interpretation and the adaptation to circumstances of this

[28] Part of the opinion is omitted.

doctrine. It is seldom possible to prove that the fraudulent act complained of was committed by the express authority of the principal, or that he gave his agent general authority to commit wrongs or frauds. Indeed it may be generally assumed that, in mercantile transactions, principals do not authorize their agents to act wrongfully, and consequently that frauds are beyond "the scope of the agent's authority" in the narrowest sense of which the expression admits. But so narrow a sense would have the effect of enabling principals largely to avail themselves of the frauds of their agents, without suffering losses or incurring liabilities on account of them, and would be opposed as much to justice as to authority. A wider construction has been put upon the words. Principals have been held liable for frauds when it has not been proved that they authorized the particular fraud complained of or gave a general authority to commit frauds; at the same time, it is not easy to define with precision the extent to which this liability has been carried. The best definition of it, in their Lordships' judgment, is to be found in the case of Barwick v. English Joint Stock Bank, L. R. 2 Ex. 259, when the judgment of the Exchequer Chamber was delivered by one of the most learned Judges who ever sat in Westminster Hall. In that case the plaintiff was induced to continue to supply oats to a customer of the bank, a contractor with the Government, on a guarantee from its manager to the effect that the customer's cheque in the plaintiff's favour, in payment for the oats supplied, should be paid on receipt of the Government money, in priority to any other payment "except to this bank." The manager fraudulently concealed from the plaintiff that the customer was indebted to the bank in £12,000.: the result was that the plaintiff was induced to advance money to the customer on a guarantee which turned out to be worthless, and which the manager must have known to have been worthless when he gave it. The declaration contained, among other counts, one for deceit, in which the fraud of the manager was laid as the fraud of the bank, on which count alone the judgment is based. Baron Martin having directed a nonsuit, a venire de novo was ordered by the Exchequer Chamber, whose judgment was delivered by Mr. Justice Willes. He expressed himself as follows:—"With respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. The principle is acted upon every day in running-down cases. It has been applied also to direct trespass to goods." After enumerating other instances of its application, he proceeds:—"In all these cases it may be said, as it

was said here, that the master had not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in." [29] * * * For these reasons their Lordships will humbly recommend Her Majesty that the judgment of the Supreme Court be reversed, and the order directing a new trial be discharged.

McCORD v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of Minnesota, 1888. 39 Minn. 181, 39 N. W. 315, 1 L. R. A. 143, 12 Am. St. Rep. 636.)

VANDERBURGH, J.[30] Dudley & Co., who resided at Grove City, Minn., were the agents of plaintiff for the purchase of wheat for him. He resided at Minneapolis, and was in the habit of forwarding money to them, to be used in making such purchases, in response to telegrams sent over the defendant's line, and delivered to him by it. On the 1st day of February, 1887, the defendant transmitted and delivered to plaintiff the following message, viz.: "Grove City, Minn., February 1, 1887. To T. M. McCord & Co.: Send one thousand or fifteen hundred to-morrow. Dudley & Co."

The plaintiff in good faith acted upon this request, believing it to be genuine, and, in accordance with his custom, forwarded through the American Express Company the sum of $1,500 in currency, properly addressed to Dudley & Co., at Grove City. It turned out, however, that this dispatch was not sent by Dudley & Co., or with their knowledge or authority; but it was in fact false and fraudulent, and was written and sent by the agent of the defendant at Grove City, whose business it was to receive and transmit messages at that place. He was also at the same time the agent of the American Express Company for the transaction of its business, and for a long time previous to the date mentioned had so acted as agent for both companies at Grove City, and was well informed of plaintiff's method of doing business with Dudley & Co. On the arrival of the package by express at Grove City, containing the sum named, it was intercepted and ab-

[29] Whether the tort was for the principal's benefit is often the test. Barwick v. Eng. Joint Stock Bank, L. R. 2 Exch. 259, 36 L. J. Exch. 147, 16 L. T. Rep. N. S. 161, 15 W. R. 877 (1867), a leading case; Garretzen v. Duenckel, 50 Mo. 104, 11 Am. Rep. 405 (1872). The liability is especially clear if the principal enjoys the fruits of the agent's wrong. Wright v. Calhoun, 19 Tex. 412 (1857). Or if the agent was acting to protect the principal's property or rights. Palmeri v. Manhattan Ry. Co., 133 N. Y. 261, 30 N. E. 1001, 16 L. R. A. 136, 28 Am. St. Rep. 632 (1892). The agent must be acting for his principal and not for himself. Brit. Mut. Banking Co. v. Charmwood Forest Ry. Co., 18 Q. B. D. 724, 52 J. P. 150, 56 L. J. Q. B. 449, 57 L. T. Rep. (N. S.) 833, 35 W. R. 590 (1887).

[30] Part of the opinion is omitted.

stracted by the agent, who converted the same to his own use. The dispatch was delivered to the plaintiff, and the money forwarded in the usual course of business. These facts, as disclosed by the record, are sufficient, we think, to establish the defendant's liability in this action.

1. Considering the business relations existing between plaintiff and Dudley & Co., the dispatch was reasonably interpreted to mean a requisition for one thousand or fifteen hundred dollars.

2. As respects the receiver of the message, it is entirely immaterial upon what terms or consideration the telegraph company undertook to send the message. It is enough that the message was sent over the line, and received in due course by plaintiff, and acted on by him in good faith. The action is one sounding in tort, and based upon the claim that the defendant is liable for the fraud and misfeasance of its agent in transmitting a false message prepared by himself. Telegraph Co. v. Dryburg, 35 Pa. 298, 78 Am. Dec. 338; Gray, Tel. § 75.

3. The principal contention of defendant is, however, that the corporation is not liable for the fraudulent and tortious act of the agent in sending the message, and that the maxim respondeat superior does not apply in such a case, because the agent in sending the dispatch was not acting for his master, but for himself, and about his own business, and was in fact the sender, and to be treated as having transcended his authority, and as acting outside of and not in the course of his employment, nor in furtherance of his master's business. But the rule which fastens a liability upon the master to third persons for the wrongful and unauthorized acts of his servant is not confined solely to that class of cases where the acts complained of are done in the course of the employment in furtherance of the master's business or interest, though there are many cases which fall within that rule. Mott v. Ice Co., 73 N. Y. 547; Savings Inst. v. Bank, 80 N. Y. 168, 36 Am. Rep. 595; Potulni v. Saunders, 37 Minn. 517, 35 N. W. Rep. 379.

Where the business with which the agent is intrusted involves a duty owed by the master to the public or third persons, if the agent, while so employed, by his own wrongful act occasions a violation of that duty, or an injury to the person interested in its faithful performance by or on behalf of the master, the master is liable for the breach of it, whether it be founded in contract or be a common-law duty growing out of the relations of the parties. 1 Shear. & R. Neg. (4th Ed.) §§ 149, 150, 154; Tayl. Corp. (2d Ed.) § 145. And it is immaterial in such case that the wrongful act of the servant is in itself willful, malicious, or fraudulent. Thus a carrier of passengers is bound to exercise due regard for their safety and welfare, and to protect them from insult. If the servants employed by such carrier in the course of such employment disregard these obligations, and maliciously and willfully, and even in disregard of the express instructions of their employers, insult and maltreat passengers, under

their care, the master is liable. Stewart v. Railroad Co., 90 N. Y. 593, 43 Am. Rep. 185. In Booth v. Bank, 50 N. Y. 400, an officer of a bank wrongfully discharged a judgment which had been recovered by the bank, after it had been assigned to the plaintiff. It was there claimed that the authority of the officer and the bank itself to satisfy the judgment had ceased, and that hence the bank was not bound by what its president did after such assignment. But the court held otherwise, evidently upon the same general principle, as respects the duty of the bank to the assignee, and laid down the general proposition equally applicable to the agent of the defendant in the case at bar, that the particular act of the agent or officer was wrongful and in violation of his duty, yet it was within the general scope of his powers, and as to innocent third parties dealing with the bank, who had sustained damages occasioned by such act, the corporation was responsible.

And the liability of the corporation in such cases is not affected by the fact that the particular act which the agent has assumed to do is one which the corporation itself could not rightfully or lawfully do. In Bank v. Bank, 16 N. Y. 125, 133, 69 Am. Dec. 678, a case frequently cited with approval, the teller of a bank was with its consent in the habit of certifying checks for customers, but he had no authority to certify, in the absence of funds, which would be a false representation, yet it was held, where he had duly certified a check though the drawer had no funds, that the bank was liable on the ground that, as between the bank which had employed the teller, and held him out as authorized to certify checks, (which involved a representation by one whose duty it was to ascertain and know the facts,) and an innocent purchaser of the check so certified, the bank ought to be the loser. Gould v. Sterling, 23 N. Y. 463; Bank v. Bank, 29 N. Y. 632. See, also, Titus v. Turnpike Co., 61 N. Y. 237; Railroad Co. v. Schuyler, 34 N. Y. 30, 64; Lane v. Cotton, 12 Mod. 490.

The defendant selected its agent, placed him in charge of its business at the station in question, and authorized him to send messages over its line. Persons receiving dispatches in the usual course of business, when there is nothing to excite suspicion, are entitled to rely upon the presumption that the agents intrusted with the performance of the business of the company have faithfully and honestly discharged the duty owed by it to its patrons, and that they would not knowingly send a false or forged message, and it would ordinarily be an unreasonable and impracticable rule to require the receiver of a dispatch to investigate the question of the integrity and fidelity of the defendant's agents in the performance of their duties before acting. Whether the agent is unfaithful to his trust, or violates his duty to, or disobeys the instructions of, the company, its patrons may have no means of knowing. If the corporation fails in the performance of its duty through the neglect or fraud of the agent whom it has delegated to perform it, the master is responsible. It was the business

of the agent to send dispatches of a similar character, and such acts were within the scope of his employment, and the plaintiff could not know the circumstances that made the particular act wrongful and unauthorized. As to him, therefore, it must be deemed the act of the corporation. Bank v. Telegraph Co., 52 Cal. 280; Booth v. Bank, supra.[31] * * *

MIDDLETON v. FOWLER.

(Court of King's Bench at Nisi Prius, 1698. 1 Salk. 282.)

An action upon the case upon the custom of the realm was brought against the defendants being masters of a stage-coach; and the plaintiff set forth, that he took a place in the coach for such a town, and that in the journey the defendants by their negligence lost a trunk of the plaintiff's. Upon not guilty pleaded, upon the evidence it appeared, that this trunk was delivered to the person that drove the coach, and he promised to take care of it, and that the trunk was lost out of the coachman's possession; and if the master was chargeable with this action, was the question. HOLT, C. J. was of opinion, that this action did not lie against the master, and that a stage-coachman was not within the custom as a carrier is, unless such as take a distinct price for carriage of goods[32] as well as persons, as waggons with coaches; and though money be given to the driver, yet that is a gratuity, and cannot bring the master within the custom; for no master is chargeable with the acts of his servant, but when he acts in execution of the authority given by his master, and then the act of the servant is the act of the master; and the plaintiff was nonsuited. Vide Rep. B. R. Temp. Hard. 85, 194. Comyns 25.

[31] Accord: Bank of Palo Alto v. Pac. Postal Tel. Cable Co. (C. C.) 103 Fed. 841 (1900); Bank of Batavia v. New York, L. E. & W. R. Co., 106 N. Y. 195, 12 N. E. 433, 60 Am. Rep. 440 (1887); contra, Friedlander v. Texas & P. Ry. Co., 130 U. S. 416, 9 Sup. Ct. 570, 32 L. Ed. 991 (1889). In the last two cases an agent, in fraudulent collusion with a third person, issued bills of lading for which he received no goods.

Many cases are, or are treated as, cases of master and servant, instead of principal and agent. The same principle governs each relation. Such are the leading cases of P. & R. R. Co. v. Derby, 14 How. 468, 14 L. Ed. 502 (1852), and nearly all the early cases in England.

For extended discussion of the term "course of employment," see St. Louis, I. M. & S. Ry. Co. v. Grant, 75 Ark. 579, 88 S. W. 580, 1133 (1905). The liability of the principal extends to corporations whose agents commit torts while in the course of their employment. Scofield Rolling Mill Co. v. Ga., 54 Ga. 635 (1875).

[32] The holding of Lord Holt that the carrier assumes no liability as to baggage unless he takes a distinct price for it is, of course, not the law today.

STICKNEY v. MONROE.

(Supreme Judicial Court of Maine, 1857. 44 Me. 195.)

Case for diverting water from the plaintiff's mill.

TENNEY, C. J.[88] * * * It is alleged in the writ, that the defendant dug up and removed the rocks and earth from the natural bed of the Schoodic river, to a great depth, and by digging up and removing the bank and bed of the river as aforesaid, and by using the new and enlarged water gates as aforesaid, did divert the water of the river from the usual and natural course, etc., to the great nuisance and damage of the plaintiffs.

The jury were instructed upon this part of the case, that if the defendant commanded or authorized his tenant, Tinker, to do the blasting and digging, which it is alleged diverts the water from the plaintiffs' shore saw mill, or ratified and approved of such acts, after they were done, and they did in fact divert the water, and occasion a damage to the plaintiffs' said mill, he would be liable for such damage; but if he had no knowledge of such acts, and did not command or authorize them, nor ratify or adopt them, and had no actual knowledge of them, he would not be liable for this injury; nor could Lowell's power of attorney put into the case, nor his general agency in relation to the defendant's mill property, if the jury are satisfied that such general agency is proved, authorize Lowell to dig or excavate the bed of the river, so as to divert the water, nor authorize him to bind the defendant, by giving Tinker liberty to do so.

Special inquiries were put to the jury: First, did the defendant authorize or ratify the digging and blasting and deepening of the channel done by Ferdinand Tinker; and, second, what amount of damage was done to the shore saw mill of the plaintiffs, by reason of the digging and blasting of the rocks and deepening of the channel by Ferdinand Tinker? To the first question, the jury answered in the negative; and to the second, the sum of seven hundred dollars, to the date of the writ.

The parties agreed, that the whole verdict is to be copied as part of the case, including the special findings in answer to the questions proposed, and if the verdict for the plaintiffs is not set aside, on account of errors of the judge, or under the motion, judgment is to be entered according to the legal rights of the parties. From this we understand that the whole evidence is submitted to the court, and if from that, it is satisfied that the defendant is answerable for the excavations made in the bed of the river, the damage found for that cause is to be added to the verdict returned, and judgment to be rendered thereon.

[88] Part of the opinion is omitted.

The acts of a general agent, or one whom a man puts in his place to transact all his business of a particular kind or of a particular place, will bind his principal, so long as he keeps within the scope of his authority, though he may act contrary to his private instructions; and the rule is necessary to prevent fraud, and encourage confidence in dealing. 2 Kent's Com. (5th Ed.) 620; Lobdell v. Bahn, 1 Metc. (Mass.) 202 (1840); Story on Agency, § 126, and note (1).

"The principal is held liable to third persons, in a civil suit for frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances and omissions of duty in his agent, in the course of his employment, although the principal did not authorize, justify, or participate in, or indeed know of such misconduct; or even if he forbade them or disapproved of them." "In every such case, the principal holds out his agent as competent and fit to be trusted; and thereby, in effect, he warrants his fidelity and good conduct in all matters of his agency." Story's Agency, § 452. And as an illustration of the principle, a carrier will be liable for the negligence of his agent, by which the goods committed to his custody are damaged or lost. Ib. § 453.

But although the principal is thus liable for torts and negligences of his agent, yet we are to understand the doctrine, with its just limitations, that the tort or negligence occurs in the course of the agency. For the principal is not liable for the torts and negligences of his agent in any matter, beyond the agency, unless he has expressly authorized them to be done, or he has subsequently adopted them for his own use and benefit. Ib. § 466, also section 455. The principal is not responsible for injuries done by the person employed by him as an agent, which he has not ordered and which were not in the course of the duty devolved upon such person. In all such cases the proper remedy is against the immediate wrong doer, for his own misconduct. Ib. § 319.

By the common law, "he that receiveth a trespasser, and agreeth to a trespass, after it is done, is no trespasser, unless the trespass was done to his use, or for his benefit, and then his agreement subsequent amounteth to a commandment; for in that case, Omnis ratihabitio retrotrahitar et mandato as quissarator" (æquiparatur). Coke, 4 Inst. 317.

The evidence shows, that in the management of the mill property at Calais, in the building of one of the mills upon the dam, upon which the Washington and the Madison are situated, and in the repairs made upon the defendant's mills from time to time, and the supervision of their operations, and the receipt of rents therefor, in connection with the fact that the defendant had his residence in Boston, and was not personally at Calais for many years in succession, Lowell was at least held out to the world as the defendant's general agent, in the charge of the property aforesaid. But it is

manifest that the scope of this agency was limited to the business of keeping the mills in a proper condition, leasing the same, and receiving the rents therefor.[34] It does not appear, that previous to the excavations complained of in this action, he had undertaken to make such an alteration in the bed of the river, as to cause a diversion of the water of the same from the wheels of other mills, to the injury of the owners thereof, or that he had done any unlawful act under his agency, commanded before or ratified after it was done, by the defendant.

It is true, that Lowell is shown by the evidence to have authorized the defendant's lessee, Tinker, to have made alterations in the channel of the river, provided no injury should be done thereby to any one, and when informed by the plaintiffs of the excavations made by Tinker, and when he saw them, he made no objections to the further prosecution of the work. But at that time the lease to Tinker had four years and one half to run, and the lessee was entitled, on request, to have the same extended, and the defendant cannot be affected by these facts.

From a full view of all the evidence in the case, there is nothing showing that these excavations were made for the use and benefit of the defendant, and that they were done by Lowell, or authorized by him, in the execution of his agency, as he was held out by the defendant; and under the special findings of the jury, and the law applicable to the facts, the defendant cannot be held liable for this portion of the injury alleged by the plaintiffs. * * *

Judgment upon the verdict.

SECTION 3.—FOR THE DECLARATIONS, REPRESENTATIONS, AND ADMISSIONS OF THE AGENT

STANDARD OIL CO. v. LINOL CO.

(Supreme Court of New Jersey, 1907. 75 N. J. Law, 294, 68 Atl. 174.)

GARRISON, J. This was an action on a book account brought by "Standard Oil Company," a corporation of New Jersey. The defendant filed a set-off to sustain which it was essential to show that the "Standard Oil Company of New York," a corporation of New York,

[34] Outside the course of his employment, the agent is as much a stranger to the principal as is any third person. Larson v. Fidelity Mut. Life Assur., 71 Minn. 101, 73 N. W. 711 (1898); So. Ry. Co. v. Chambers, 126 Ga. 404, 55 S. E. 37, 7 L. R. A. (N. S.) 926 (1906). When the agent turns aside, for however short a time, from his principal's work to engage in an affair wholly his own, he ceases to act as agent. Galveston, H. & S. Ry. Co. v. Currie, 100 Tex. 136, 96 S. W. 1073, 10 L. R. A. (N. S.) 367 (1906), approved in Grand Temple, etc., Order v. Johnson (Tex. Civ. App.) 135 S. W. 173 (1911).

had acted as and was, in fact, the agent of the plaintiff in ordering the goods for the price of which the set-off was filed. The main attempt of the defendant toward the establishment of this fact was the offer to prove the statements or declarations made by the various persons with whom it had dealt in the transaction in question. All of these offers were properly overruled. Agency cannot be proved by the declarations of one assuming to act in that capacity. Until the declarant is shown to be the agent of a party to the suit, his declarations (including his declaration that he is such agent) are inadmissible. Brounfield v. Denton, 72 N. J. Law, 235, 61 Atl. 378.

After a specific ruling to this effect upon a question put to a witness that was on the stand, the state of the case shows that "the defendant thereupon stated that he desired to show facts and circumstances in the course of the dealings between the alleged plaintiff and defendant from which as a whole it might be inferred that the Newark concern was the agent for Standard Oil Company of New York."

"The court adhered to its former ruling, and refused to admit the testimony."

If the statement of a desire by the defendant be taken as equivalent to an offer of proof, the ruling, in effect, was that, if the desire was to bind a party to the suit by declarations of persons assuming to act as its agents, it was within the ruling already made. If the defendant desired to adduce testimony that did not fall within this ruling, an offer to that effect should have been made in such form that the court might determine whether the new offer differed in principle from those already ruled upon. This might have been done either by putting to a witness a specific question calling for such new testimony, or, if the court permitted an offer to be made, by making an offer to prove certain definite facts. From the brief of counsel for the defendant, rather than from the state of the case, it is to be gathered that what the defendant wanted to prove was a series of statements made by persons not authorized to bind their employer by volunteer declarations or narratives touching the master's affairs. It cannot be too often pointed out that the mere fact that one employs others to work for him does not make him chargeable with what they may say about him or his affairs while in his employ. If he employs them to talk for him, a different case may be presented. King v. Atlantic Cy. Ga. Co., 70 N. J. Law, 679, 58 Atl. 345.

Finding no legal error in the case presented upon this appeal the judgment of the First District Court of Jersey City is affirmed.

HILL v. HELTON.

(Supreme Court of Alabama, 1886. 80 Ala. 528, 1 South. 340.)

CLOPTON, J.[85] The appellee brings this suit to recover the proceeds of cotton which was sold by the appellants as commission merchants. There seems to be no controversy as to the ownership or sale of the cotton. The disputed question is, in what capacity did Johnson Martin, to whom defendants accounted for the proceeds, act—whether he shipped the cotton merely as depot agent, or whether as agent of the plaintiff under an arrangement between the defendant and Martin by which they advanced him money to control the shipments of cotton? * * *

Agency, like any other controvertible fact, may be proved by circumstances. It may be inferred from previous employment in similar acts or transactions, or from acts of such nature, and so continuous, as to furnish a reasonable basis of inference that they were known to the principal, and that he would not have allowed the agent so to act unless authorized. In such cases, the acts or transactions are admissible to prove agency. But, in order to be relevant, the alleged principal must, in some way, directly or indirectly, be connected with the circumstances. The agent must have assumed to represent the principal, and to have performed the acts in his name and on his behalf. The testimony of the witness Allison tended to prove nothing more than that Martin was engaged in the business of shipping the cotton of planters in the neighborhood of Stevenson other than the plaintiff, and receiving and controlling the proceeds, and that this was generally known. It is not pretended that he had previously shipped or controlled any cotton as agent of the plaintiff. From the facts that Martin was engaged in the business of shipping cotton, separate from his duties of depot agent, and had controlled the cotton of other planters, it does not follow, and cannot be reasonably inferred, that the plaintiff authorized him to ship and control the cotton in question as his agent. Acts done by Martin as the agent of other planters are not admissible and relevant to prove agency in the particular shipment of the plaintiff's cotton, in the absence of other evidence or authority, express or implied from circumstances, furnishing a ground of reasonable inference of assent, adoption, or acquiescence. Fisher v. Campbell, 9 Port. 210.

The declarations and admissions of an agent are admissible against and bind his principal, when made during the continuance of the agency, and while in the discharge of his duties as such, respecting a transaction then depending, and so contemporaneous with the main fact or subject of the agency as to constitute a part of the res gestæ. "The rule admitting the declarations of an agent is founded upon the legal identity of the agent and the principal, and therefore they bind

[85] Part of the opinion is omitted.

only so far as there is authority to make them." Declarations, mere narrations of past occurrences, are not admissible. Danner L. & L. Co. v. Stonewall Ins. Co., 77 Ala. 184; Whart. Ev. § 1173; 1 Greenl. Ev. §§ 113, 114. Preliminary proof of authority to make the declarations is requisite to their admissibility and binding effect. The letters and written statements of Martin, offered by the defendants, are but his declarations. The evident purpose of their introduction was to show either the agency and the extent of authority, or a purchase of the cotton and payment therefor. They are not admissible for either purpose. Agency and the extent of authority must be established by evidence other than the acts and statements of the supposed agent. None of the letters or statements prima facie represent any transaction performed by Martin as agent of the plaintiff, and while in the discharge of his duties as such agent. With two exceptions, none of them allude to the cotton in controversy; and those which make any reference to it are narratives of past occurrences, and declarations of a purchase and payment. They do not come within the rule of admissibility.[36] * * *

Judgment for plaintiff affirmed.

[36] Accord: Geylin v. De Villerol, 2 Houst. 311 (1860), supra, pp. 50, 334, in which the court charged the jury: "Wherever one person appoints another his agent, to represent him in any business transaction, then whatever the agent does within the scope of his authority, or in the lawful prosecution of that business, becomes in law the act of the principal whom he represents. And, that wherever the acts of the agent will bind the principal, there the representations, orders, declarations, admissions and statements of the agent in respect to the same subject matter or business, will also bind the principal, if made at the time of the transaction. These representations, orders, declarations, admissions, or statements are received and considered as original evidence, as verbal acts or facts constituting part of the transaction itself and not as hearsay; and therefore it is not necessary, as has been contended for, to call the agent himself to prove them, but they may be proved by any other competent testimony or witness. But it is insisted by the counsel for the defendant that the fact of agency has not been proved in this case, neither expressly nor by implication or inference. If it has not, then certainly the plaintiff's case has failed, and your verdict should be for the defendant. But if, on the other hand, the existence of the agency has been shown to the satisfaction of the jury, either expressly, or by implication or fair inference, then we say the plaintiff is entitled to recover for whatever was done, supplied, or expended under the directions of the agent and within the scope of his authority." This is substantially the doctrine as stated by Story on Agency, quoted in Sandford v. Handy, 23 Wend. 260 (1840). The conflicting opinions of the judges in Udell v. Atherton, 7 H. & N. 171, 7 Jur. (N. S.) 777, 30 L. J. Exch. 337, 4 L. T. Rep. (N. S.) 797 (1861), are suggestive.

HOYER v. LUDINGTON.[87]

(Supreme Court of Wisconsin, 1898. 100 Wis. 441, 76 N. W. 348.)

The complaint alleged that one Meyers was agent of Ludington to sell his land; that as such agent he organized a corporation to buy it, and by false representations induced the plaintiff to buy stock in such corporation, which was worthless, etc. Wherefore he prayed judgment against Ludington and Meyers.

CASSODAY, C. J.[88] * * * The action having come on for trial before the judge and a jury, and a witness having been upon the stand, the defendant Ludington objected to any evidence under the complaint as to him, upon the grounds that the complaint did not state a cause of action as against him. Thereupon the court sustained the objection of Ludington, and ordered the complaint as to him to be dismissed. From the portion of the judgment entered thereon accordingly, dismissing the action as against Ludington, the plaintiff brings this appeal.

There is no doubt of the general proposition that, if an agent is employed to effect the sale of lands for his principal, and he does so by means of false representations in respect to the land conveyed, even without the authority or knowledge of his principal, the latter is chargeable with such fraud in the same manner as if he had known or authorized the same. Law v. Grant, 37 Wis. 548; McKinnon v. Vollmar, 75 Wis. 82, 43 N. W. 800, 6 L. R. A. 121, 17 Am. St. Rep. 178; Gunther v. Ullrich, 82 Wis. 222, 52 N. W. 88, 33 Am. St. Rep. 32. And this is especially so where the principal accepts and enjoys the benefits of the purchase. Fintel v. Cook, 88 Wis. 487, 60 N. W. 788. But, even then, "the representation which is to bind the principal must be made in reference to the subject-matter of his agency. It must be made while the agent is acting as such. And the making of such a representation must be within the apparent scope of his authority." Mechem, Ag. § 743.

Here the alleged false representations were not made in reference to the sale of the land which was the subject-matter of the agency, but wholly in reference to creating and organizing a corporation to purchase the land. There is no pretense that Ludington had anything to do with the corporation or the procuring of subscriptions to any of the capital stock of the corporation. True, it is alleged that such false and fraudulent representations, and each of them, were made by Meyers as the agent of Ludington, and while acting within

[87] Accord: Matteson v. Rice, 116 Wis. 328, 92 N. W. 1109 (1903), in which, however, the court found the representations of the agent within the scope of his authority, tested not by the intention of the principal, but by connection with the property and business of the agency. See, also, Latham v. First Nat. Bank, 92 Ark. 315, 122 S. W. 992 (1909); Mussey v. Bucher, 3 Cush. 511 (1849); Olson v. G. N. Ry. Co., 81 Minn. 402, 84 N. W. 219 (1900).

[88] Part of the opinion is omitted.

the course and scope of his employment. The demurrer ore tenus only admitted the issuable facts alleged in the complaint, but did not admit such mere conclusions of law from the facts alleged. Aron v. City of Wausau, 98 Wis. 592, 74 N. W. 354, 40 L. R. A. 733, and cases there cited. The representations of Meyers in respect to the corporation, and the capital stock thereof, were not within the apparent scope of his authority to sell the land. Besides, it appears from the complaint that Meyers was only an agent of Ludington for the purpose of selling the particular lands in question. He was not a general, but only a special, agent. "The scope of the authority of a special agent is ordinarily much more restricted than that of a general agent." Mechem, Ag. § 285. "While a general agent may bind his principal when acting within the scope of his apparent authority, although he exceeds his specific instructions, yet that is not the rule in the case of a special agent." Bryant v. Bank, 95 Wis. 481, 70 N. W. 482, and authorities there cited. We are clearly of the opinion that the complaint fails to state a cause of action.

The portion of the judgment of the circuit court appealed from is affirmed.

SECTION 4.—FOR NOTICE TO AGENT

I. IN GENERAL

MERRY v. ABNEY.

(High Court of Chancery, 1661. 1 Ch. Cas. 38, 22 Eng. Reprint, 682.)

Chief Justice FOSTER, the Master of the Rolls:

A. contracts with B. for sale of Lands, but sells them to C., etc., sans Notice of the first Contract.

Kendal contracted with the Plaintiff to sell him certain Lands in Leicestershire. Afterwards Abney the Father, who lived near the Lands, in behalf of Abney the Son (a Merchant in London) purchaseth those Lands of Kendal, and had a Conveyance from Kendal to Abney the Son, and his Heirs. The Plaintiff's Bill was to be relieved upon his Contract with Kendal, and against the Conveyance to Abney, and charged Notice of his Contract to both the Abneys. Abney the Son pleads himself to be a Purchaser bona fide, without any Notice of Kendal's Contract with the Plaintiff, and without any Trust for his Father.

The Court declared, That Notice to the Father in this Case was Notice to the Son, and should affect the Son, who was the pur-

chaser.[39] So that Notice of a dormant Incumbrance to a Party that purchaseth for another, shall affect the very Purchaser. And accordingly was this Cause decreed, it appearing at the Hearing, that Abney the Father had Notice of Merry's Contract before he purchased for his Son.

FIELD v. CAMPBELL.

(Supreme Court of Indiana, 1904. 164 Ind. 389, 72 N. E. 260, 108 Am. St. Rep. 301.)

Action by Campbell, as administrator of the estate of one Noblett, to recover on a note, and to foreclose a mortgage which defendant and her husband executed to secure said note. The note was given to raise money to pay for the husband a deficit in his accounts as treasurer of Orange county. The evidence showed that, if Noblett did not know this purpose, his agent Hicks must have known it. The Indiana statute made any contract of suretyship by a married woman void. Judgment for plaintiff.

GILLETT, J.[40] * * * 4. In determining the extent that Noblett had notice of what was to be done with the money received by appellant, it is important to consider what notice he himself had, and the notice, if not the actual knowledge, which his agent, Hicks, had, and the notice based on the record. Notwithstanding any conclusions indulged in by Hicks in his testimony, it is plain that he was an agent of Noblett, not only to appraise the land, but to pass upon the title and conclude the loan. All this was within the scope of his agency, and to the extent that he had notice or knowledge must notice or knowledge be imputed to his principal. It is laid down in Story on Agency, § 140, that "notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from, or is at the time connected with, the subject-matter of his agency; for, upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal; and, if he has not, still, the principal having intrusted the agent with the particular business, the other party has a right to deem his acts and knowledge obligatory upon the principal." It was said by Lord Broughman in Kennedy v. Green, 3 Myl. & K. 699: "The doctrine of constructive notice depends upon two considerations: First, that certain things existing in the relation or conduct of the parties as in the case between them beget a presumption so strong of actual knowledge that the law holds the knowledge to exist because it is highly improbable that it should not; and, next, that the policy and safety of the public for-

[39] Notice to the agent is good notice to the party. Brotherton v. Hatt, 2 Vern. 574, 2 Freem. 290, 23 Eng. Reprint, 973 (1706).

[40] Part of the opinion is omitted.

bid a person to deny knowledge while he is dealing so as to keep himself ignorant, or so that he may keep himself ignorant, and yet all the while let his agent know, and himself perhaps profit by that knowledge. In such a case it would be most iniquitous and most dangerous, and give shelter and encouragement to all kinds of fraud, were the law not to consider the knowledge of one common to both, whether it be so in fact or not." A writer on the law of agency states the doctrine thus: "The principal is chargeable with notice of all the material facts which come to the knowledge of his agent in the transactions in which the agent is acting for the principal. If this were not so, a purchaser would always free himself from possible equities arising from the acquisition of knowledge of adverse rights by purchasing through an agent. It is against the policy of the law to place one who deals through an agent in a better position than one who deals in person." Huffcutt on Agency, § 141. "My solicitor," as was said in an English case, "is my alter ego; he is myself. I stand in precisely the position he does in the transaction, and therefore his knowledge is my knowledge; and it would be a monstrous injustice that I could take advantage of what he knows without the disadvantage." Boursot v. Savage, L. R. 2 Eq. 134.

5. The fact that the mortgage to the bondsmen of the husband was of record lifts the information which Noblett admits that he had concerning it above the plane of mere rumor, if his answer upon the stand is to be so construed. "Any instrument affecting the title which is properly recorded is absolute notice to every one subsequently dealing with the title, irrespective of whether such person has examined the records, or even had an opportunity to make an examination." Wade on Notice (2d Ed.) § 97. See, also, Webb v. John Hancock, etc., Co., 162 Ind. 616, 69 N. E. 1006, 66 L. R. A. 632; McPherson v. Rollins, 107 N. Y. 316, 14 N. E. 411, 1 Am. St. Rep. 826.

6. Taken as a whole, the authorities warrant the assertion that the notice which the law imputes from notice to an agent, or from the fact that an instrument in the chain of title is properly of record, is the equivalent of actual notice. We are not unmindful that a false representation might sometimes lead a person who contemplated loaning money on real estate security to omit to examine the record, but we fail to perceive how the effect of such a representation would be to prevent an agent from informing his principal of facts which it was nevertheless the agent's duty to communicate, or why that should furnish any reason for not conclusively presuming, as in other cases, that the duty of the agent to communicate facts of importance to his principal was discharged. And the indulgence of this presumption in the case before us, thereby infecting Noblett with the notice of Hicks, makes it just, as we

think, to hold that the representation of appellant was not of such a character as to relieve Noblett of the imputation of record notice.[41] * * *

Judgment reversed and a new trial ordered.

CLEMENT v. YOUNG–McSHEA AMUSEMENT CO.[42]

(Court of Errors and Appeals of New Jersey, 1906. 70 N. J. Eq. 677, 67 Atl. 82, 118 Am. St. Rep. 747.)

The Amusement Company owned a building, fronting on the board walk of Atlantic City, known as Young's Hotel. The company is a corporation with 1,500 shares of stock, of which John L. Young owned 1,440. He was treasurer of the company, and his son-in-law, Shackelford, was the secretary. There were two other directors. Young controlled the affairs of the company, and had unwritten authority to lease its property. Shackelford was its manager. Clement leased from Young a space at the entrance of the hotel for a soft drink stand. Shackelford made out and signed for Young a lease of the same for ten years, and Clement fitted up the stand at a cost of $6,000. Shackelford collected the rent and Young reported to the company. Two years later, the company brought ejectment, and plaintiffs filed this bill to enjoin the prosecution of the suit. Decree for perpetual injunction, and the company appeals.

DIXON, J.[43] [After holding that under the New Jersey statute of frauds such a lease made by an agent not having written authority

[41] Accord: Suit v. Woodhall, 113 Mass. 391 (1873). The notice may be implied, as well as express. Hart v. Sandy, 39 W. Va. 644, 20 S. E. 665 (1894). The presumption that the agent has communicated material facts, coming to his knowledge as to the business intrusted to him, is conclusive. Pringle v. Modern Woodmen of America, 76 Neb. 384, 107 N. W. 756, 113 N. W. 231 (1906).

[42] Accord: Topliff v. Shadwell, 68 Kan. 317, 74 Pac. 1120 (1904). "Notice to an agent of facts not arising from, or connected with, the subject-matter of his agency, is not notice to the principal, unless actually communicated to him." Renton, Holmes & Co. v. Monnier, 77 Cal. 449, 19 Pac. 820 (1888). "The agent represents the principal only in the matters pertaining to his agency." Stewart v. Sonneborn, 49 Ala. 178 (1873). The notice must be as to a matter which it is the agent's duty to communicate to his principal. Pennoyer v. Willis, 26 Or. 1, 36 Pac. 568, 46 Am. St. Rep. 594 (1894); Warren v. Hayes, 74 N. H. 355, 68 Atl. 193 (1907). This applies with special force to a corporation which has different agents for different departments of its business. International Building & Loan Ass'n v. Watson, 158 Ind. 508, 64 N. E. 23 (1902); Missouri, K. & T. Ry. Co. v. Belcher, 88 Tex. 549, 32 S. W. 518 (1895). By the same rule, and within the same limits, the previously acquired knowledge of the agent is available to the principal for his benefit. Haines v. Starkey, 82 Minn. 230, 84 N. W. 910 (1901).

But the agent is presumed to communicate to his principal every fact having direct and important bearing on the subject-matter of the agency, and the principal will be charged with notice of such facts. Bierce v. Red Bluff Hotel Co., 31 Cal. 160 (1866).

[43] Part of the opinion is omitted.

was in effect a lease at will, and considering the effect of the knowledge by Young and Shackelford that complainant was paying the rent and had made the improvements:] * * * Finally, it is urged that the knowledge of Young and of Shackelford should be imputed to the company.

Assuming that Young, in executing the lease, was attempting or appearing to act for the company, notwithstanding the form of the instrument, then, if his knowledge that he was overstepping the bounds of his authority is to be deemed notice thereof to his principal, no effective limitation can be imposed upon the power of an agent. By the very act of transgressing the limits of his authority, the agent would generally for all practical purposes enlarge them to the full extent of his transgression. Nothing short of immediate personal investigation on the part of the principal would, in most instances, protect his rights. An examination of the cases already cited will show that such a doctrine has no place in either legal or equitable jurisprudence.

The knowledge of Shackelford cannot be imputed to the company, because he was never authorized to act as its agent in any matter to which that knowledge was pertinent. His testimony is explicit and uncontradicted that in signing the lease and collecting the rent he acted solely on behalf of Young, and had no authority whatever from the company. Although he was secretary of the company during the running of the lease, and became a director in November, 1903, yet in neither capacity did any duty rest upon him concerning the complainants' tenancy. Whether the view stated in Sooy v. State, 41 N. J. Law, 394, or that stated in Willard v. Denise, 50 N. J. Eq. 482, 26 Atl. 29, 35 Am. St. Rep. 788, be adopted, knowledge possessed by one person cannot be ascribed to another, unless there exists between them a relation of agency in the exercise of which the knowledge would be useful.

We find no ground on which, consistently with established rules, the decree below can be supported, and it must be reversed, and the bill dismissed. Decree reversed and bill dismissed.

DAY v. WAMSLEY.

(Supreme Court of Judicature of Indiana, 1870. 33 Ind. 145.)

Complaint by appellee for goods sold and delivered to appellant. Defense that the goods were sold to defendant's wife, from whom he was separated. To show that plaintiff had notice of this, a deposition was offered, setting forth a conversation in which deponent told Atkison, later a clerk of plaintiff, that Day and wife were separated.

RAY, J.[44] * * * The deposition discloses that Atkison, at the

[44] Part of the opinion is omitted.

date of the purchase of the goods by appellant's wife, was salesman in appellee's store and assisted in the sale of part of the goods for the value of which the suit was brought. The conversation spoken of by the witness occurred a few months before the date of the sale. It does not appear that Atkison was in the employ of the appellee at the date of the conversation, and therefore notice to him by such conversation would not be, according to Judge Story's view, constructive notice to his subsequent employer. Story on Agency, § 140. There are authorities, however, which controvert this rule. Story, Eq. Jurisp. § 408, note 2. But the conversation was not of such a nature as would naturally require the agent to communicate it to his principal, if he were actually in the employ of the appellee. It was the mere idle talk of parties having no interest in the subject discussed, and not likely to make any impression on the mind of the agent. The notice to the agent, to operate as constructive notice to the principal, must be such as would reasonably charge the agent, on failure to repeat, with breach of faith and duty to his employer,[45] and therefore the law will, under such circumstances only, presume he has communicated his knowledge to his principal. Story on Agency, § 140, and authorities cited. The rule, indeed, is, that the special circumstances of each case must control the admission or rejection of the evidence. Story, Eq. Jurisp., supra.

The court committed no error in excluding the evidence. Judgment affirmed, with 10 per cent. damages and costs.

II. Time of Receiving Notice

WORSLEY v. EARL OF SCARBOROUGH.

(High Court of Chancery, 1746. 3 Atk. 392, 26 Eng. Reprint, 1025.)

HARDWICKE, Ld. Ch.[46] * * * Thirdly, No case has gone so far, and it would be very inconvenient, if where money is secured upon an estate, and there is a question depending in this court upon the right of or about that money, *but no question relating to the estate, upon which it is secured, but is wholly a collateral matter, that a purchaser of the estate pending that suit should be* affected with notice by such implication as the law creates by the pendency of a suit.

[45] As to vague rumor and suspicion, see Stanley v. Schwalby, 162 U. S. 255, 276, 16 Sup. Ct. 754, 40 L. Ed. 960 (1896); Shafer v. Phœnix Ins. Co., 53 Wis. 361, 10 N. W. 381 (1881); Satterfield v. Malone (C. C.) 35 Fed. 445, 1 L. R. A. 35 (1888). As to information derived through interested parties, and from a reliable source, Mulliken v. Graham, 72 Pa. 484 (1871). As to notice in the newspapers, and mere notoriety, Page v. Brast, 18 Ill. 37 (1856). As to notice acquired incidentally, Stennett v. Pa. Fire Ins. Co., 68 Iowa, 674, 28 N. W. 12 (1886).

[46] Part of the opinion is omitted.

Fourthly, It is settled, that notice to an agent or counsel *who was employed in the thing by another person, or in another business, and at another time,* is *no notice* to his client, who employs him afterwards; and it would be very mischievous if it was so, for the man of most practice and greatest eminence would then be the most dangerous to employ.[47]

MOUNTFORD v. SCOTT.

(High Court of Chancery, 1823. 1 Turner & R. 274, 24 Rev. Rep. 55, 12 Eng. Ch. 274, 37 Eng. Rep. 1105.)

The bill prayed that defendants either pay plaintiff what was due him for building certain houses on property leased to Scott, and by him subleased to defendants Blake, who afterwards sold them to defendant Warren by deed poll, or that they might be decreed to assign to plaintiff all their interest in the original lease to Scott. The underlease and deed poll were prepared by the same solicitor, and he knew that the original lease had been deposited with plaintiff as security for advances to be made in building the houses.

ELDON, Ld. Ch. I am clearly of opinion that there is in this case no ground for determining that the plaintiff is entitled to relief. It is true that it is established that a deposit of deeds is to be taken as a fact of evidence that the deposit is made for the purpose of securing money; that was laid down by Lord Thurlow, upon the notion that the deposit could be made for no other purpose; but the whole tenor of all the cases is, that that doctrine is not to be carried further. The Vice Chancellor in this case appears to have proceeded upon the notion, that notice to a man in one transaction is not to be taken as notice to him in another transaction; in that view of the case it might fall to be considered, whether one transaction might not follow so close upon the other, as to render it impossible to give a man credit for having forgotten it. I should be unwilling to go so far as to say, that if an attorney has notice of a transaction in the morning, he shall be held in a court of equity to have forgotten it in the evening; it must in all cases depend upon the circumstances.

[47] Ld. Ch. Hardwicke reached the same conclusion in Warrick v. Warrick, 3 Atk. 291, 26 Eng. Rep. 970 (1745), and in the leading case of Le Neve v. Le Neve, 3 Atk. 646, 26 Eng. Rep. 1172 (1748).

Many cases in the United States have followed this rule. See Pepper & Co. v. George, 51 Ala. 190 (1874), in which the court regards the rule as for the convenience of lawyers rather than in conformity to truth. Houseman v. Girard Mutual Ass'n, 81 Pa. 256 (1876), in which Justice Sharswood says the rule is not grounded on the fallibility of the memory of man, but on the technical ground "that it is only during the agency that the agent represents and stands in the shoes of the principal, that notice to him is then notice to his principal. Notice to him twenty-four hours before the relation commenced is no more notice than notice twenty-four hours after it had ceased to be. Wright v. Bruschke, 62 Ill. App. 358 (1896), but cf. Snyder v. Partridge, 138 Ill. 173, 29 N. E. 851, 32 Am. St. Rep. 130 (1891).

Supposing that when Warner took this assignment, he was affected with notice of what was known to Gyles in the transaction with Blake, it is a clear fact in proof in this cause that the lease was not deposited for money advanced at the time; if it was put into the hands of the plaintiff as a security at all, it must have been for an antecedent debt; but the account which Gyles gives of the transaction is, that the lease was carried to the plaintiff, not for the purpose of being applied as a security for money already advanced, but for the purpose of obtaining future credit; I apprehend it has never been held, that if deeds are carried to a man for the purpose of obtaining credit from him, he has a lien upon them for what is due to him in respect of moneys theretofore advanced. Such a decision would carry the doctrine upon mortgages by deposit of deeds, further than it has ever yet been carried. This decree therefore must be affirmed.

Decree affirmed.[48]

THE DISTILLED SPIRITS.

(Supreme Court of the United States, 1870. 11 Wall. 356, 20 L. Ed. 167.)

The United States filed an information for the forfeiture of 278 barrels of distilled spirits for fraudulently removing them from a bonded warehouse without paying the revenue tax. It was found that Harrington, who claimed 124 barrels, had bought through one Boyden as his agent. Boyden knew of the fraud, but did not participate in it. Harrington knew nothing of it. The jury found against 50 barrels claimed by Harrington and all claimed by Boyden.

BRADLEY, J.[49] * * * The substance of the third instruction prayed for was, that if the spirits were removed from the warehouse according to the forms of law, and the claimants bought them without knowledge of the fraud, they were not liable to forfeiture. The court charged in accordance with this prayer with this qualification, that if Boyden bought the spirits as agent for Harrington, and was cognizant of the fraud, Harrington would be bound by his knowledge. The claimants insist that this is not law.

The question how far a purchaser is affected with notice of prior liens, trusts, or frauds, by the knowledge of his agent who effects the purchase, is one that has been much mooted in England and this country. That he is bound and affected by such knowledge or notice as his agent obtains in negotiating the particular transaction, is everywhere conceded. But Lord Hardwicke thought that the rule

[48] This case affirms, though on a different ground, 3 Madd. 34, 18 Rev. Rep. 189, 56 Eng. Rep. 422 (1818), and was approved in Nixon v. Hamilton, 2 Dr. & W. 364, 392 (1838), in which is an interesting review of the English cases, and in Hargreaves v. Rothwell, 1 Keen, Ch. 154 (1836). See, also, Dresser v. Norwood, 17 C. B. (N. S.) 466, 10 Jur. (N. S.) 851, 34 L. J. C. P. 48, 11 L. T. Rep. (N. S.) 111, 12 W. R. 1030, 112 E. C. L. 466 (1864).

[49] Part of the opinion is omitted.

could not be extended so far as to affect the principal by knowledge of the agent acquired previously in a different transaction. Warrick v. Warrick, 3 Atkyns, 291. Supposing it to be clear, that the agent still retained the knowledge so formerly acquired, it was certainly making a very nice and thin distinction. Lord Eldon did not approve of it. In Mountford v. Scott, 1 Turner & Russell, 274, he says: "It may fall to be considered whether one transaction might not follow so close upon the other as to render it impossible to give a man credit for having forgotten it. I should be unwilling to go so far as to say, that if an attorney has notice of a transaction in the morning, he shall be held in a court of equity to have forgotten it in the evening; it must in all cases depend upon the circumstances." The distinction taken by Lord Hardwicke has since been entirely overruled by the Court of Exchequer Chamber in the case of Dresser v. Norwood, 17 Common Bench, N. S. 466. So that in England the doctrine now seems to be established, that if the agent, at the time of effecting a purchase, has knowledge of any prior lien, trust, or fraud, affecting the property, no matter when he acquired such knowledge, his principal is affected thereby. If he acquire the knowledge when he effects the purchase, no question can arise as to his having it at that time; if he acquired it previous to the purchase, the presumption that he still retains it, and has it present to his mind, will depend on the lapse of time and other circumstances. Knowledge communicated to the principal himself he is bound to recollect, but he is not bound by knowledge communicated to his agent, unless it is present to the agent's mind at the time of effecting the purchase. Clear and satisfactory proof that it was so present seems to be the only restriction required by the English rule as now understood. With the qualification that the agent is at liberty to communicate his knowledge to his principal, it appears to us to be a sound view of the subject. The general rule that a principal is bound by the knowledge of his agent is based on the principle of law, that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject-matter of negotiation, and the presumption that he will perform that duty. When it is not the agent's duty to communicate such knowledge, when it would be unlawful for him to do so, as, for example, when it has been acquired confidentially as attorney for a former client in a prior transaction, the reason of the rule ceases, and in such a case an agent would not be expected to do that which would involve the betrayal of professional confidence, and his principal ought not to be bound by his agent's secret and confidential information. This often happened in the case of large estates in England, where men of great professional eminence were frequently consulted. They thus became possessed, in a confidential manner, of secret trusts or other defects of title, which they could not honorably, if they could legally, communicate to subsequent clients. This difficulty presented itself to Lord Hardwicke's

mind, and undoubtedly lay at the bottom of the distinction which he established. Had he confined it to such cases, it would have been entirely unexceptionable.

The general tendency of decisions in this country has been to adopt the distinction of Lord Hardwicke, but it has several times been held, in consonance with Lord Eldon's suggestion, that if the agent acquired his information so recently as to make it incredible that he should have forgotten it, his principal will be bound. This is really an abandonment of the principle on which the distinction is founded. Story on Agency, § 140; Hovey v. Blanchard, 13 N. H. 145; Patten v. Insurance Co., 40 N. H. 375; Hart v. Farmers' & Mechanics' Bank, 33 Vt. 252. The case of Hart v. Farmers' & Mechanics' Bank, 33 Vt. 252, adopts the rule established by the case of Dresser v. Norwood. Other cases, as that of Bank of United States v. Davis, 2 Hill, 452, New York Central Insurance Co. v. National Protection Co., 20 Barb. 468, adhere to the more rigid view. [See cases collected in note to American edition of 17 Common Bench, N. S., p. 482, and Mr. Justice Clifford's opinion in the Circuit Court in the present case.]

On the whole, however, we think that the rule as finally settled by the English courts, with the qualification above mentioned, is the true one, and is deduced from the best consideration of the reasons on which it is founded. Applying it to the case in hand, we think that the charge was substantially correct. The fair construction of the charge is, that if the jury believed that Boyden, the agent, was cognizant of the fraud at the time of the purchase, Harrington, the principal, was bound by this knowledge.[50] The precise words were "that if Boyden bought the spirits as agent for Harrington, and Boyden was cognizant of the fraud, Harrington would be bound by his knowledge." The plain and natural sense of these words, and that in which the jury would understand them, we think, is that they refer to Boyden's knowledge at the time of making the purchase. Thus construed the charge is strictly in accordance with the law as above explained. There was no pretence that Boyden acquired his knowledge in a fiduciary character. * * * Judgment affirmed.

[50] Accord: Constant v. Univ. of Rochester, 111 N. Y. 604, 19 N. E. 631, 2 L. R. A. 734, 7 Am. St. Rep. 769 (1889), a leading case; Snyder v. Partridge, 138 Ill. 173, 29 N. E. 851, 32 Am. St. Rep. 130 (1891); Schwind v. Boyce, 94 Md. 510, 51 Atl. 45 (1902).

There must be clear and satisfactory proof of the presence in the agent's mind of the antecedent knowledge. Equitable Securities Co. v. Sheppard, 78 Miss. 217, 28 South. 842 (1900), in which the incident was six years old; Stennett v. Pa. Fire Ins. Co., 68 Iowa, 674, 28 N. W. 12 (1886).

The tendency is to keep this extension of the rule within narrow limits. Witterbrock v. Parker, 102 Cal. 93, 36 Pac. 374, 24 L. R. A. 197, 41 Am. St. Rep. 172 (1894); Trentor v. Pothen, 46 Minn. 298, 49 N. W. 129, 24 Am. St. Rep. 225 (1891). The law does not presume that what is ever known will always be present in the memory. Kauffman v. Robey, 60 Tex. 308, 48 Am. Rep. 264 (1883).

FAIRFIELD SAVINGS BANK v. CHASE.

(Supreme Judicial Court of Maine, 1881. 72 Me. 226, 39 Am. Rep. 319.)

Writ of entry to recover possession of certain land.

PETERS, J. A notice to a bank director or trustee, or knowledge obtained by him, while not engaged either officially or as an agent or attorney in the business of the bank, is inoperative as a notice to the bank. If otherwise, corporations would incur the same liability for the unofficial acts of directors that partnerships do for the acts of partners; and corporate business would be subjected oftentimes to extraordinary confusion and hazards. Carry the proposition, that notice to a director is notice to the bank, to its logical sequence, and a corporation might be made responsible for all the frauds and all the negligences, pertaining to its business, of any and all its directors not officially employed. Any one director would have as much power as all the directors.

A single trustee or director has no power to act for the institution that creates his office, except in conjunction with others. It is the board of directors only that can act.[51] If the board of directors or trustees makes a director or any person its officer or agent to act for it, then such officer or agent has the same power to act, within the authority delegated to him, that the board itself has. His authority is in such case the authority of the board. Notice to such officer or agent or attorney, who is at the time acting for the corporation in the matter in question, and within the range of his authority or supervision, is notice to the corporation. Abbott's Trial Ev. 45, and cases in note; Fulton Bank v. Canal Co., 4 Paige, 127; La Farge Fire Ins. Co. v. Bell, 22 Barb. 54; National Bank v. Norton, 1 Hill (N. Y.) 578; Bank of U. S. v. Davis, 2 Hill (N. Y.) 454; North River Bank v. Aymar, 3 Hill (N. Y.) 263; Ins. Co. v. Ins. Co., 10 Md. 517, 69 Am. Dec. 174; Bank v. Payne, 25 Conn. 444, 68 Am. Dec. 362; Farrell Foundry v. Dart, 26 Conn. 376; Smith v. South Royalton Bank, 32 Vt. 341, 76 Am. Dec. 179; Washington Bank v. Lewis, 22 Pick. 24; Commercial Bank v. Cunningham, 24 Pick. 270, 35 Am. Dec. 322; Housatonic Bank v. Martin, 1 Metc. (Mass.) 308; 1 Pars. Con. *77; Story, Agen. § 140; South. Law Rev. N. S. vol. 6, p. 45; Hoover v. Wise, 91 U. S. 308, 23 L. Ed. 392.

Another question arises in the case before us. It appears that Brown's knowledge of a previous conveyance was acquired anterior to his employment by the bank, if employed by the bank at all, and not during or in the course of his employment on their account. The

[51] As to the knowledge of directors of a corporation, see First Nat. Bank v. Christopher, 40 N. J. Law, 435, 29 Am. Rep. 262 (1878). While engaged in the business of the corporation, see City Bank v. Phillips, 22 Mo. 85, 64 Am. Dec. 254 (1855); Innerarity v. Merchants' Nat. Bank, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710 (1885); First Nat. Bank v. Blake (C. C.) 60 Fed. 78 (1894).

question is, whether a principal is bound by knowledge or notice which his agent had previous to his employment in the service of the principal.

Upon this question the authorities disagree. The negative of the question has been uniformly maintained in Pennsylvania and some other of the states. In the late case of Houseman v. Building Association, 81 Pa. 256, it was said, that "notice to an agent twenty-four hours before the relation commenced is no more notice than twenty-four hours after it has ceased would be." But we think, all things considered, the safer and better rule to be that the knowledge of an agent, obtained prior to his employment as agent, will be an implied or imputed notice to the principal, under certain limitations and conditions, which are these: The knowledge must be present to the mind of the agent when acting for the principal, so fully in his mind that it could not have been at the time forgotten by him; the knowledge or notice must be of a matter so material to the transaction as to make it the agent's duty to communicate the fact to his principal; and the agent must himself have no personal interest in the matter which would lead him to conceal his knowledge from his principal, but must be at liberty to communicate it. Additional modification might be required in some cases.

These elements appearing, it seems just to say that a previous notice to an agent is present notice to the principal. The presumption, that an agent will do what it is his right and duty to do, having no personal motive or interest to do the contrary, is so strong that the law does not allow it to be denied. There may be instances where the rule operates harshly; but, under the rule reversed, many frauds could be easily perpetrated. Of course, the knowledge must be that of a person who is executing some agency, and not acting merely in some ministerial capacity, as servant or clerk. For instance; if in the present case Brown had merely taken the acknowledgment of the deed to the bank, or had transcribed the deed as a clerk or copyist, such acts would not have imposed a duty to impart his knowledge to the bank. But if employed to obtain the title for the bank by a deed to be drawn by him for the purpose, that would place the transaction within the rule. Jones Mort. (2d Ed.) § 587. Notice of the existence of an unrecorded mortgage upon the property to an officer employed to make an attachment, is notice to the plaintiff. Tucker v. Tilton, 55 N. H. 223. In the case before us, Brown, it is claimed by the defendant was employed by the bank to make an instrument to convey a title from a person to the bank. Brown knew that such person had not the title. It would be his duty to so inform his client. He would be likely to do so. He had no motive not to do it. The law conclusively presumes that he did inform him. We think such a case comes reasonably within the rule, though it is not so marked a case as it would be if Brown had been employed by the bank to

ascertain if the grantor had the title, and if he had then to make the deed.

The general rule or principle touching this case, guarded by the cautions and conditions stated, is supported by the later English cases, although the earlier English cases went the other way; is also the law of the United States Supreme Court; and is, we think, sustained by a preponderance of opinion in the state courts where the question has been discussed. Fuller v. Bennett, 2 Hare, 394; Dresser v. Norwood, 17 C. B. (N. S.) 466; Rolland v. Hart, L. R. 6 Ch. App. 687; The Distilled Spirits, 11 Wall. 356, 20 L. Ed. 167; Hovey v. Blanchard, 13 N. H. 148; Hart v. Bank, 33 Vt. 252; Suit v. Woodhall, 113 Mass. 391; National Bank v. Cushman, 121 Mass. 490; Anketel v. Converse, 17 Ohio St. 11, 91 Am. Dec. 115; Hoppock v. Johnson, 14 Wis. 303; Lawrence v. Tucker, 7 Me. (7 Greenl.) 195; Jones Mort. (2d Ed.) § 584, and following sections and notes. Many other cases, on both sides the questions, will be found cited and reviewed, in a learned article in the Amer. Law Reg. (Phila.) New Series, vol. 16, p. 1.

An application of this rule to the facts of this case, requires the verdict to be set aside. S. S. Brown, while a trustee of the Fairfield Savings Bank, had actual knowledge that John W. Chase had deeded certain land to Isaac Chase. Knowing that fact, he as an attorney wrote and took the acknowledgment of a mortgage of the same land from John W. Chase to the bank, and the mortgage was recorded first. The question was whether the bank had knowledge of the prior deed when the mortgage was taken. The pro forma ruling that the knowledge of Brown was sufficient notice to the bank to overcome the legal effect of the fact that the mortgage was recorded before the deed, irrespective of the further question whether Brown was at the time of making the mortgage, acting as an attorney in the business and employment of the bank or not, was erroneous. It is contended that the evidence shows that Brown was acting for the bank. But the fact being at least questionable, it should have been passed upon by the jury.

Exceptions sustained.

III. Exceptions to the Rule of Notice

PURSLEY v. STAHLEY.

(Supreme Court of Georgia, 1905. 122 Ga. 362, 50 S. E. 139.)

Mrs. Stahley sued Mrs. Pursley on certain notes which she had signed at the request of Green & Preston, attorneys of plaintiff. She owed them $50, and supposed she was signing them as security for that debt. She could read, but was ignorant of business matters and did not know what she was signing. Judgment on the notes.

LAMAR, J. [After stating the facts:] The principal is bound by notice to his agent for the same reason and to the same extent that he is bound by the act of his agent. In both cases it must be limited to matters within the scope of the agency. Notice as to such matters binds the principal, according to some authorities, on the theory that the agent and principal are to be regarded as one; according to others, on the theory that the agent may and should act for his principal on such information; and, according to others, because there is a presumption that such notice would be communicated. See Morris v. Georgia Loan Co., 109 Ga. 24, 34 S. E. 378, 46 L. R. A. 506; Civ. Code 1895, §§ 3027, 3028. But when the agent departs from the scope of the agency, and begins to act for himself, and not for the principal; when his private interest is allowed to outweigh his duty as a representative; when to communicate the information would prevent the accomplishment of his fraudulent scheme—he becomes an opposite party, not an agent. The reason for the rule then ceases. Where, therefore, the agent, who is an intermediary, is guilty of an independent fraud for his own benefit, the law does not impute to the principal notice of such fraud. Instead of being communicated, it would be purposely and fraudulently concealed. Instead of the lender being bound by constructive notice, the borrower must be bound by her actual signature to the note for $500.

2. Both parties may be innocent. The defendant, however, put it in the power of a third person to do the wrong, and she must bear the loss. She was endeavoring to arrange to borrow money to pay her own debt. She allowed the creditor to prepare the paper. He represented the borrower as much as he did the lender. Notice of the fraud could have been as logically imputed to one as to the other. In law, he was the agent of neither, but drew the note for the excessive amount for his own personal advantage, and in the commission of an independent fraud.[52] Merchants' Bank v. Demere, 92 Ga.

[52] Accord: Frenkel v. Hudson, 82 Ala. 158, 2 South. 758, 60 Am. Rep. 736 (1886), in which the rule was applied to knowledge by a corporation of facts known by the president who was acting in his own interest. Com. Bank v. Burgwyn, 110 N. C. 267, 14 S. E. 623, 17 L. R. A. 326 (1892); Innerarity v. Merchants' Nat. Bank, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710 (1885), a leading case; Gunster v. Scranton Illuminating Heat & Power Co., 181 Pa. 327, 37 Atl. 550, 59 Am. St. Rep. 650 (1897), containing a valuable review of the cases, and criticising First Nat. Bank v. New Milford, 36 Conn. 93 (1869).

When the agent abandons the object of his agency, and acts for himself, it has been held he is outside the scope of his authority, and to that extent ceases to be agent. Henry v. Allen, 151 N. Y. 1, 45 N. E. 355, 36 L. R. A. 658 (1896), reversing 77 Hun, 49, 28 N. Y. Supp. 242 (1894), and followed in Bienentok v. Ammidown, 155 N. Y. 47, 49 N. E. 321 (1898); Allen v. So. Boston R. Co., 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. Rep. 185 (1889); Knobelock v. Germania Sav. Bank, 50 S. C. 259, 27 S. E. 962 (1896); De Kay v. Hackensack Water Co., 38 N. J. Eq. 158 (1884), followed in Camden Safe Deposit & Trust Co. v. Lord, 67 N. J. Eq. 489, 58 Atl. 607 (1904); Bank of Overton v. Thompson, 118 Fed. 798, 56 C. C. A. 554 (1902). The exception extends to cases in which the agent acquired his knowledge in confidential relations so that he is not at liberty to disclose it. Hummel v. Bank of Monroe, 75

739, 19 S. E. 38; Gunster v. Scranton Co., 181 Pa. 327, 37 Atl. 550, 59 Am. St. Rep. 650; Civ. Code 1895, §§ 3028, 3940. On the facts, the case is clear. The defendant could read. There was no emergency. She signed a deed and twelve notes. Years afterwards she signed six additional notes relating to the same debt, and at a time when it was not alleged that the agent was present.

The judgment must be affirmed. All the Justices concurring.

Iowa, 689, 37 N. W. 954 (1888); Hickman v. Green, 123 Mo. 165, 22 S. W. 455, 27 S. W. 440, 29 L. R. A. 39 (1894); Kennedy v. Green, 3 My. & K. 699, 10 Eng. Ch. 699, 40 Eng. Rep. 266 (1834). And to cases in which he was really agent of the opposite party. Ætna Indemnity Co. v. Schroeder, 12 N. D. 110, 95 N. W. 436 (1903). And to cases in which the person claiming the benefit of the notice colludes with the agent to defraud the principal. Cowan v. Curran, 216 Ill. 598, 617, 75 N. E. 322 (1905).

CHAPTER VI

LIABILITY OF THE THIRD PERSON TO THE PRINCIPAL

SECTION 1.—ON THE CONTRACT MADE BY THE AGENT

I. Disclosed Principal

FORD v. WILLIAMS.

(Supreme Court of the United States, 1858. 21 How. 287, 16 L. Ed. 36.)

Ford sued Williams on a written contract by which the latter agreed to receive from Bell 2,000 barrels of flour at $9 per barrel.

Mr. Justice Grier. The single question presented for our decision in this case is, whether the principal can maintain an action on a written contract made by his agent in his own name, without disclosing the name of the principal.

It is not necessary to the validity of a contract, under the statute of frauds, that the writing disclose the principal. In the brief memoranda of these contracts usually made by brokers and factors, it is seldom done. If a party is informed that the person with whom he is dealing is merely the agent for another, and prefers to deal with the agent personally on his own credit, he will not be allowed afterwards to charge the principal; but when he deals with the agent, without any disclosure of the fact of his agency, he may elect to treat the after-discovered principal as the person with whom he contracted.

The contract of the agent is the contract of the principal, and he may sue or be sued thereon, though not named therein; and notwithstanding the rule of law that an agreement reduced to writing may not be contradicted or varied by parol, it is well settled that the principal may show that the agent who made the contract in his own name was acting for him. This proof does not contradict the writing; it only explains the transaction. But the agent, who binds himself, will not be allowed to contradict the writing by proving that he was contracting only as agent, while the same evidence will be admitted to charge the principal. "Such evidence (says Baron Parke) does not deny that the contract binds those whom on its face it purports to bind; but shows that it also binds another, by reason that the act of the agent is the act of the principal." (See Higgins v. Senior, 9 Meeson and Wilsby, 843.)

The array of cases and treatises cited by the plaintiff's counsel shows conclusively that this question is settled, not only by the courts of England and many of the States, but by this court. (See New Jersey Steam Navigation Co. v. Merchants' Bank, 6 How. 381, 12 L. Ed. 465, et cas. ib. cit.) [1]

The judgment of the court below is therefore reversed, and a venire de novo awarded.

BEEBEE v. ROBERT.

(Supreme Court of Judicature of New York, 1834. 12 Wend. 413, 27 Am. Dec. 132.)

Assumpsit for breach of warranty in the sale of cotton by sample. The cotton was bought by Woolley, a broker, in his own name on the order of plaintiff.

SUTHERLAND, J.[2] The suit was properly brought in the name of the present plaintiffs. Woolley acted as their factor or agent merely, in the purchase of the cotton; he had no interest in the transaction beyond his commissions; he is not responsible to the plaintiffs for the defect in the quality of the cotton; he has suffered no injury, and no action could be sustained in his name against the defendant for the breach of the implied warranty—there was no express contract or agreement with him. If Woolley, the factor, had failed to pay for the cotton, Robert could have recovered its value from the plaintiffs. When goods are brought by a broker or other agent, and he does not disclose his principal at the time, the principal, when discovered, is liable on the contracts which his agent has made for him. 2 Livermore on Agency, 200. Waring v. Faverick, 1 Campb. 85; Kymer v. Suwercropp, Id. 109; 4 Taunt. 576, n. a.; Pentz v. Stanton, 10 Wend. 271, 25 Am. Dec. 558.

Where the principal is disclosed at the time of the purchase, it then becomes a question of fact, to be determined from all the circumstances in the case, whether the vendor relied exclusively upon the credit of the agent or not. If he did, he cannot afterwards resort to the principal. 2 Liver. 200, 201. 15 East, 62. 4 Taunt. 574. If the plaintiffs might have been made responsible to the defendant for the purchase money upon this contract, it would seem to follow that there is sufficient privity of contract between them, to enable the plaintiffs to maintain this action against him for the alleged violation of his part of the agreement. The general rule is, that the action should be brought in the name of the party whose legal interest has been af-

[1] Accord: Powell v. Wade, 109 Ala. 95, 19 South. 500, 55 Am. St. Rep. 915 (1895), holding that the burden of proof to show the agency lies on the principal in such cases; Kingsley v. Siebrecht, 92 Me. 23, 42 Atl. 249, 69 Am. St. Rep. 486 (1898), containing a valuable review of the cases, especially as to contracts within the Statute of Frauds.

[2] Part of the opinion is omitted.

fected, against the party who committed the injury. 1 Chitty's Pl. 1. Hammond on Parties to Action, 3. 1 Bos. & Pull. 101, n. c. 3 Bos. & Pull. 149, and note. Dawes v. Peck, 8 T. R. 330. Gunn v. Cantine, 10 Johns. 387. Yates v. Foote, 12 Johns. 1. In Spencer v. Field, 10 Wend. 87, and Sailly v. Cleveland & Hutton, 10 Wend. 156, the question as to the proper parties to an action was discussed at length, and most of the authorities were there referred to. Those cases clearly show that this action is properly brought in the names of the present plaintiffs. * * *

New trial denied.

HUMPHREY v. LUCAS.

(Court of Queen's Bench at Nisi Prius, 1845. 2 Car. & K. 152, 61 E. C. L. 152.)

Assumpsit for the non-fulfillment of a contract by the defendant, to transfer to the plaintiff certain shares in "The Birmingham and Gloucester Railway Company." Plea, non assumpsit.

The contract was made on the Stock Exchange of Liverpool, by two brokers who were members of that body. The plaintiff's broker did not disclose the name of his principal at the time the contract was entered into. The plaintiff was not a member of the Liverpool Stock Exchange, but he was cognizant of the rules thereof.

Watson, for the defendant, tendered these rules in evidence, in order to shew that they controlled the contract; and he contended, that, as, by the rules of the Liverpool Stock Exchange, the contract in question was a contract between the two brokers only, the broker not having disclosed his principal, the latter was not entitled to sue upon such contract.

CRESSWELL, J. They are not admissible as evidence for any such purpose. I take the law to be clear, that an agent duly authorized may make a contract in his own name, and that the principal may afterwards sue upon it.[a] In the present case, the plea is the general issue; and the only question on this record therefore is, whether the plaintiff made a contract with the defendant or not. I think he did. The rules of the Liverpool Stock Exchange cannot alter the general law of the land.

Verdict for the plaintiff.

[a] See the authorities collected, Russell on Factors, 245, 246.

II. UNDISCLOSED PRINCIPAL

WOODRUFF v. McGEHEE.

(Supreme Court of Georgia, 1860. 30 Ga. 158.)

Action for damages for breach of warranty of a horse made to one Lee, plaintiff's agent.

STEPHENS, J. The only reason assigned for the rejection of this warranty is that it is made to the agent, the principal not being known in the transaction. But the authorities are express that the principal may claim all his rights, though not at first known, just as if he had been known, with the single limitation that the other party shall not lose any right which he would have against the agent if the agent were principal as he had first been supposed to be. See Story on Agency, § 418. The reason of the doctrine is, that it is but just that every man should have what really, though secretly, belongs to him, so far as he can obtain it *without injuring another* by appearing in his true character of owner. We think the action is maintainable in the name of the before unknown principal, and that the evidence ought to have been admitted.[4]

Judgment reversed.

WINCHESTER v. HOWARD.

(Supreme Judicial Court of Massachusetts, 1867. 97 Mass. 303, 93 Am. Dec. 93.)

CHAPMAN, J. The court are of opinion that it should have been left to the jury in this case to determine whether the minds of the parties really met upon any contract; and if so, what the contract was.

It is true that an agent may sell the property of his principal without disclosing the fact that he acts as an agent, or that the property is not his own; and the principal may maintain an action in his own name to recover the price. If the purchaser says nothing on the subject, he is liable to the unknown principal. Huntington v. Knox, 7 Cush. 371. But on the other hand, every man has a right to elect what parties he will deal with. As was remarked by Lord Denman in Humble v. Hunter, 12 Q. B. 311, "You have a right to the benefit you contemplate from the character, credit and substance of the person with whom you contract." There may be good reasons

[4] The undisclosed principal may be a stranger, both to the promise and the consideration. Rea v. Barker (C. C.) 135 Fed. 890 (1904). He must, however, prove that he is the real principal. Sims v. Bond, 5 B. & Ald. 389, 27 E. C. L. 97 (1833).

why one should be unwilling to buy a pair of oxen that had been owned or used or were claimed by a particular person, or why he should be unwilling to have any dealings with that person; and as a man's right to refuse to enter into a contract is absolute, he is not obliged to submit the validity of his reasons to a court or jury.[5]

In this case it appears that Smith, the plaintiffs' agent, told the defendant that he had a pair of oxen for sale, (referring to the oxen in question,) and that another pair belonging to one Blanchard were in his possession, which pair he was authorized to sell. A jury might properly find that this amounted to a representation that the oxen in question were his own. The defendant then made inquiries; in answer to which Smith affirmed that the oxen had never been hurt; that the plaintiffs had no mortgage upon them, and that there was no claim upon them except the claim which Smith had. A jury might properly find that this was, in substance, a representation that the title to the oxen was exclusively in Smith; and that, as the defendant was unwilling to deal with the plaintiffs, he made proper inquiries on the subject, and was led by Smith to believe he was not dealing with the plaintiffs. The defendant took the cattle home with an agreement that he might return them "if he did not find things as Smith had told him." In the course of the evening he was informed that the cattle belonged to the plaintiffs, and being unwilling to buy oxen of them, he returned them to Smith the next morning before any bill of sale had been made. The jury would be authorized to find that he

[5] In Arkansas Valley Smelting Co. v. Belden Co., 127 U. S. 379, 8 Sup. Ct. 1308, 32 L. Ed. 246 (1888), Gray, J., puts the case thus: "But every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, 'You have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract.' Humble v. Hunter, 12 Q. B. 310, 317; Winchester v. Howard, 97 Mass. 303, 305, 93 Am. Dec. 93; Ice Co. v. Potter, 123 Mass. 28, 25 Am. Rep. 9; King v. Batterson, 13 R. I. 117, 120, 43 Am. Rep. 13; Lansden v. McCarthy, 45 Mo. 106. The rule upon this subject, as applicable to the case at bar, is well expressed in a recent English treatise: 'Rights arising out of contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided.'"

The exception is applied to a purely executory contract in Pancoast v. Dinsmore, 105 Me. 471, 75 Atl. 43, 134 Am. St. Rep. 582 (1909). See, also, Cowan v. Curran, 216 Ill. 598, 75 N. E. 322 (1905). Contra: Kelly v. Thuey, 143 Mo. 422, 45 S. W. 300 (1898), with which cf. Id., 102 Mo. 522, 15 S. W. 62 (1890).

The above exception has no application in cases where it does not appear that the third person relied on the learning, skill, and knowledge or reliability of the agent of the undisclosed principal, and where no personal service is involved. Wiehle v. Safford, 27 Misc. Rep. 562, 58 N. Y. Supp. 298 (1899). Nor to cases where the principal contracted as agent and now sets up that he was the real principal, and the agent a mere man of straw. Bickerton v. Burrell, 5 Manle & S. 383 (1816).

See Moline Malleable Iron Co. v. York Iron Co., 83 Fed. 66, 27 C. C. A. 442 (1897), summarizing the exceptions to the rule.

returned them within the terms of the condition upon which he took them, because he did not find things as Smith had told him. It is thus apparent that upon the whole evidence they would be justified in finding a verdict for the defendant.

Exceptions sustained.

BARRY v. PAGE.

(Supreme Judicial Court of Massachusetts, 1858. 10 Gray, 398.)

Action by a citizen of New York to recover the price of goods, sold by his factors in Boston to the defendants. Verdict for plaintiff and defendant alleged exceptions.

BIGELOW, J.[6] * * * 2. As the contract of an agent is in law the contract of the principal, the latter may come forward and sue thereon, although at the time the contract was made the agent acted as and appeared to be the principal. There is a qualification of the rule, by which it is held that when a contract has been made for an undisclosed principal, who permits his agent to act as apparent principal in the transaction, the right of the former to intervene and bring suit in his own name is not allowed in any way to affect or impair the right of the other contracting party, but he will in such case be let in to all the equities, set-offs and other defences to which he would have been entitled, if the action had been brought in the name of the agent. But in the case at bar it does not appear that the defendant has any defence to the action, which he could have made if it had been brought by the agent. The objection is purely technical, and goes only to defeat the right of action by the principal, irrespectively of any meritorious answer to the suit.

It has been sometimes said that when a sale is made by a factor for a foreign principal, the latter cannot sue for the price. This supposed exception has been put on the ground that in such case the presumption at law is, that exclusive credit was given to the agent, and therefore the principal cannot be treated in any manner whatever as a party to the contract. But the later and better opinion is, that there is no such absolute presumption, and that a principal, whether foreign or domestic, may sue to recover the price of goods sold by his factor, unless it is made affirmatively to appear that exclusive credit was given to the agent, by proof, other than the mere fact that the principal resided in another state or country. Story on Agency, § 420.) Paley on Agency (4th Amer. Ed.) 324, note. Taintor v. Prendergast, 3 Hill, 72, 38 Am. Dec. 618. Ilsley v. Merriam, 7 Cush. 242, 54 Am. Dec. 721. No fact appears in the exceptions to show

[6] Part of the opinion is omitted.

any exclusive credit by which to take the present case out of the ordinary rule by which the principal can maintain an action in his own name.[7]

Exceptions overruled.

COPELAND v. TOUCHSTONE.

(Supreme Court of Alabama, 1849. 16 Ala. 333, 50 Am. Dec. 181.)

Error to the County Court of Mobile.

This suit was commenced in a Justice's Court, and taken by appeal to the County Court. The plaintiff having established his demand the defendant proved as an offset an account for work done by one Richardson, who was a journey-man wheelright in the employment of defendant. The plaintiff in rebuttal proved that the contract for the work was made with Richardson alone, that plaintiff was not informed that he was in the employment of the defendant, and that he paid said Richardson for it as the work was done. Upon this state of facts, the cause was submitted to the decision of the court, and judgment was rendered allowing the defendant's offset.

This judgment is now assigned as error.

CHILTON, J. It certainly cannot be assumed, that because the work was done at the shop of the defendant, he is entitled to recover for it. Copeland contracted with Richardson, in utter ignorance of the relation which existed between him and his employer, Touchstone. Conceding, then, that as between the latter and Richardson, the relation of principal and agent obtained, or that Richardson was in the employment of Touchstone, who was entitled to all his earnings, it is too well settled now to be questioned, that if Copeland was

[7] Accord: Dresser v. Norwood, 14 C. B. (N. S.) 574, 588, 108 E. C. L. 574 (1863), in which the third person was allowed to set off a debt due him from the agent; Traub v. Milliken, 57 Me. 63, 2 Am. Rep. 14 (1869), in which the third person had paid the agent; Taintor v. Prendergast, 3 Hill (N. Y.) 72, 38 Am. Dec. 618 (1842); Foster v. Graham, 166 Mass. 202, 44 N. E. 129 (1896), quoting with approval the principal case, Sullivan v. Shailer, 70 Conn. 733, 40 Atl. 1054 (1898), with a valuable review of cases; Belfield v. Nat. Supply Co., 189 Pa. 189, 42 Atl. 131, 69 Am. St. Rep. 799 (1899).

The principal takes such a contract subject to all rights of the third person, just as though the agent were the principal. Foster v. Smith, 2 Cold. 474, 88 Am. Dec. 604 (1865); Rosser v. Darden, 82 Ga. 219, 7 South. 919, 14 Am. St. Rep. 152 (1888).

If the third person ought to know he is dealing with an agent, he must be on his guard or he cannot claim a set off on a debt due from the agent. Miller v. Lea, 35 Md. 396, 6 Am. Rep. 417 (1872); Frazier v. Poindexter, 78 Ark. 241, 95 S. W. 464, 115 Am. St. Rep. 33, 8 Ann. Cas. 552 (1906).

As to distinctions between foreign and domestic principals, see Oelricks v. Ford, 23 How. 49, 16 L. Ed. 534 (1859). Certainly the various states of the United States are not "foreign" so as to affect this rule.

As to suit by agent of an undisclosed principal on a sealed instrument, see Schaefer v. Henkel, 75 N. Y. 378, 57 How. Prac. 97 (1878), 7 Abb. N. C. 1; ante, p. 712. Accord: Lessee of Clarke v. Courtney, 5 Pet. 319, 8 L. Ed. 140 (1831); ante, p. 453.

ignorant of this fact—if he negotiated with Richardson as the principal, supposing him to be so, and paid him for the work before he had notice of any claim on the part of Touchstone, he will be protected in such payment.

Judge Story, in his work on Agency, p. 439, § 430, says—"The modes and circumstances under which such payments are made to the agent may have a material bearing on the rights of the principal. If the payments are received by the agent according to the ordinary course of business, or even if they are made out of the ordinary course of business, if the agent alone is known or is supposed to be the principal, the latter will be bound thereby. Mr. Pailey lays down the same doctrine. "If," says he, "the agent act for a principal undisclosed, he has authority to receive payment." Until the principal appears, the agent is to be regarded as the proprietor.—Liv. on Agency, 226–232; Faveric v. Bennett, 11 East. 38; Coates v. Lewis, 1 Camp. Rep. 444; Blackburn v. Schoales, 2 Id. 341; Stewart v. Aberdein, 4 Mees. & Welsb. 211; see, also, Governor v. Daily, 14 Ala. 469, 472.

So, in the case before us, the party dealing with the journeyman, having no notice of the fact that he was working for the defendant in error, and having made to him full payment before he was informed by the defendant that he claimed the price of the work, must be considered as discharged from any obligation to pay the money over again to the principal.—Smith's Mercantile Law, 129.[8]

It results from what we have said, that the County Court mistook the law in holding the plaintiff in error liable for the payment he had previously made to Richardson.

The judgment is consequently reversed, and the cause remanded.

PITTS v. MOWER.

(Supreme Judicial Court of Maine, 1841. 18 Me. 361, 36 Am. Dec. 727.)

Assumpsit for the price of a "horse power" sold to defendant by H. A. Pitts, who was the agent of plaintiff. The agent took in payment notes running to himself. The case comes up on exceptions to the ruling and instructions in the trial court.

SHEPLEY, J. It has been decided, that the disclosure of a trustee and the judgment upon it are to be received in evidence only between those, who are parties to the suit. Wise v. Hilton, 4 Greenl. 435.

In this case the plaintiff was not a party to the suit in which the disclosure was made, and he is not bound by that judgment.

When an agent sells the goods of his principal and takes a promissory note payable to himself, the principal may interpose before pay-

[8] So payment is good to a broker who sells as principal. Townsend v. Inglis, 1 Holt, 278, 3 E. C. L. 101 (1816); Coates v. Lewis, 1 Campb. 444 (1808), per Ld. Ellenborough.

ment, and forbid it to be made to his agent; and a payment to the agent after this will not be good. And the principal may sue in his own name on the contract of sale, except when, as with us, it is extinguished by taking a negotiable promise. It is said in argument for the defendants, that the law will not imply a promise where there is an express one; and that there being an express one in the note to Hiram A. Pitts one cannot be implied to the plaintiff. The law regards the express contract made with the agent in the purchase as made with the principal and as remaining unextinguished by the note not negotiable. These rights of the principal are well established and were recognized in the cases of Titcomb v. Seaver, 4 Greenl. 542, and Edmond v. Caldwell, 15 Me. 340. In this case the defendants were notified before payment or judgment against them as trustees, that the plaintiff was the owner of the property sold, and that he claimed to have the payment made to himself. If they thought proper to disregard that notice, the rights of the plaintiff cannot thereby be impaired.[9]

Exceptions sustained and new trial granted.

SECTION 2.—FOR FUNDS OR PROPERTY OF THE PRINCIPAL

TAYLOR v. PLUMER.

(Court of King's Bench, 1815. 3 Maule & S. 562, 2 Rose, 457, 16 Rev. Rep. 361.)

Defendant entrusted to one Walsh, his broker, a draft for £22,200. with which to buy exchequer bills. The broker misapplied the most of the funds from the draft by purchasing American Securities, intending to abscond with them to America. He was arrested before escaping the country, and handed over to his principal the American Securities. On the day he misapplied the money he had become bankrupt, and his assignees now bring trover for the securities.

Lord ELLENBOROUGH, Ch. J. After stating the case, his Lordship said, The plaintiff in this case is not entitled to recover if the defendant has succeeded in maintaining these propositions in point of law, viz., that the property of a principal entrusted by him to his factor for any special purpose belongs to the principal, notwithstanding any change which that property may have undergone in point of form, so long as such property is capable of being identified, and distin-

[9] It matters not that the third person has promised to pay the note to the agent. Farmers' & Mechanics' Nat. Bank v. King, 57 Pa. 202, 98 Am. Dec. 215 (1868).

guished from all other property. And, secondly, that all property thus circumstanced is equally recoverable from the assignees of the factor, in the event of his becoming a bankrupt, as it was from the factor himself before his bankruptcy. And, indeed, upon a view of the authorities, and consideration of the arguments, it should seem that if the property in its original state and form was covered with a trust in favour of the principal, no change of that state and form can divest it of such trust, or give the factor, or those who represent him in right, any other more valid claim in respect to it, than they respectively had before such change. An abuse of trust can confer no rights on the party abusing it, nor on those who claim in privity with him. The argument which has been advanced in favour of the plaintiffs, that the property of the principal continues only so long as the authority of the principal is pursued in respect to the order and disposition of it, and that it ceases when the property is tortiously converted into another form for the use of the factor himself, is mischievous in principle, and supported by no authorities of law. And the position which was held out in argument on the part of the plaintiffs, as being the untenable result of the arguments on the part of the defendant, is no doubt a result deducible from those arguments; but unless it be a result at variance with the law, the plaintiffs are not on that account entitled to recover. The contention on the part of the defendant was represented by the plaintiffs' counsel as pushed to what he conceived to be an extravagant length, in the defendant's counsel being obliged to contend, that "if A. is trusted by B. with money to purchase a horse for him, and he purchases a carriage with that money, that B. is entitled to the carriage." And, indeed, if he be not so entitled, the case on the part of the defendant appears to be hardly sustainable in argument. It makes no difference in reason or law into what other form, different from the original, the change may have been made, whether it be into that of promissory notes for the security of the money which was produced by the sale of the goods of the principal, as in Scott v. Surman, Willes, 400, or into other merchandize, as in Whitecomb v. Jacob, Salk. 160, for the product of or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail, which is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description. The difficulty which arises in such a case is a difficulty of fact and not of law, and the dictum that money has no ear-mark must be understood in the same way; i. e. as predicated only of an undivided and undistinguishable mass of current money. But money in a bag, or otherwise kept apart from other money, guineas, or other coin marked (if the fact were so) for the purpose of being distinguished, are so far ear-marked as to fall within the rule on this subject, which

applies to every other description of personal property whilst it remains, (as the property in question did,) in the hands of the factor, or his general legal representatives.[10] * * *

A nonsuit must be entered.

PEARCE et al. v. DILL.

(Supreme Court of Judicature of Indiana, 1897. 149 Ind. 136, 48 N. E. 788.)

Plaintiff deposited over $5,000 in her name in the defendant bank, giving her husband authority to check it out for her business. He had dealings with Pearce, who maintained a bucket shop, and to pay for "futures" or "options" in wheat and corn, he drew checks for $4,700 in Pearce's favor. These the bank received, and transferred the amount to the account of Pearce. Dill and Pearce are both insolvent, and Mrs. Dill seeks in equity to have the court restore to her account the moneys wrongfully transferred and still standing in the account of Pearce. From judgment for plaintiff, defendants appeal.

JORDAN, J.[11] * * * The insistence of counsel for appellee is that E. S. Dill, the agent of their client, committed a breach of trust, and wrongfully diverted the money of his principal into the hands of the appellant Pearce, and that she has the right, under the facts and the law applicable thereto, to trace it into Pearce's bank account, to which it had been transferred, and have it restored to her by the court as her property. The authorities generally affirm and support the right of a cestui que trust to pursue and recover trust funds wrongfully diverted, where their identity has not been lost, and where they have not passed into the hands of parties for value without notice of the trust. Whenever any property or fund in its original state has once been impressed with the character or nature of a trust, no subsequent change of its original form or condition can devest it of its trust character, so long as it is capable of being identified, and the beneficiary thereof may pursue and reclaim it, regardless of the form into which it may have been changed, provided it has not gone into the possession of a bona fide purchaser without notice. All that the law contemplates by requiring the property or fund to be identified is a substantial identification, and, in case the fund consists of money, the cestui que trust may reclaim it, although not able to trace the identical coins or bills, so long as its identity as a fund can be ascertained. It is a well-settled principle that the abuse of a trust fund by a trustee or fiduciary confers no right upon him, nor upon those who claim in privity with him. Where the fund has been misapplied,

[10] As to the right of the principal to his property in the hands of third persons, see, also, ante, p. 591.

[11] Part of the opinion is omitted.

or converted into other property, or mixed with the funds of the trustee, or of those claiming through him, and can be traced and identified, courts will attribute the ownership to the cestui que trust, and will not permit the wrongful act of the trustee or fiduciary in mixing the trust fund with his own funds, or those of a third party, to defeat a recovery, but, in general, in such cases, will separate the trust fund from the others with which it has been commingled, and restore it to the beneficiary entitled to receive it. Bevis v. Heflin, 63 Ind. 129; Bundy v. Town of Monticello, 84 Ind. 119; Riehl v. Association, 104 Ind. 70, 3 N. E. 633; Orb v. Coapstick, 136 Ind. 313, 36 N. E. 278. Shepard v. Bank (No. 17,783) 149 Ind. 532, 48 N. E. 346. See, also, the many leading authorities collected in a note to the case of Bank v. Goetz, 32 Am. St. Rep. 119, on page 125 (s. c. 138 Ill. 127, 27 N. E. 907).

The rule is, when the right to pursue and reclaim a trust fund exists, that the true owner thereof, when the fund is traced to the possession of another, and identified, has the right to have it restored to him, not as a debt due and owing to him, but for the reason that it is his property, wrongfully diverted and withheld; and it can make no difference, in regard to the right of recovery in such a case, whether the fund has been traced into the possession of a single individual or into the hands of a firm or association composed of many persons, or into the form of a bank account. In re Hallett's Estate and Knatchbull v. Hallett, 13 Ch. Div. 696; Englar v. Offutt, 70 Md. 78, 16 Atl. 497, 14 Am. St. Rep. 332; National Bank v. Insurance Co., 104 U. S. 54, 26 L. Ed. 693.

The evidence, as we have seen, discloses that Dill was the agent of the appellee, and only authorized to draw checks upon her money in the bank for her use or in her business. The relation between him and the appellee was of a fiduciary character, and in the use of her money in this respect he occupied the position of a trustee; and, in the event that he wrongfully diverted or misapplied such funds, the rules relating to the pursuit and recovery of a trust fund apply. Riehl v. Association, supra; Roca v. Byrne, 145 N. Y. 182, 39 N. E. 812, 45 Am. St. Rep. 599. * * *

To summarize, in conclusion, the agent of the appellee is shown to have abused his trust by wrongfully diverting the money of his principal into the hands of Pearce for an illegal consideration. The latter accepted the checks in controversy with knowledge that the funds upon which they were drawn belonged to appellee, and that Dill, with whom he dealt, was misappropriating the money. By the means of these checks, which, in his hands at least, were tainted with the illegality of the transactions in the settlement of which they were drawn, appellant procured the bank to swell his account with the money belonging to appellee. Under the facts, certainly it must be said that

the equities are all with the appellee, and neither of the appellants are in a position to successfully assail her right to recover.[12]

Some other alleged errors are discussed by appellants' counsel, but the judgment is so manifestly right upon the evidence that, even if we should concede that the intervening rulings of which they complain were erroneous, they would not result in a reversal. Section 670, Rev. St. 1894 (section 658, Rev. St. 1881). The judgment is affirmed, at the cost of the appellants.

LIME ROCK BANK v. PLIMPTON.

(Supreme Judicial Court of Massachusetts, 1835. 17 Pick. 159, 28 Am. Dec. 286.)

WILDE, J. The plaintiff's claim is not founded on any privity between the parties, arising from an express contract, but on principles of equity imposing an obligation on the defendants, which the law will imply a promise on their part to fulfil. It is contended that the defendants have money in their hands belonging to the plaintiffs, which they cannot in equity and good conscience retain, and that in such case an action for money had and received will lie. And this general principle is undoubtedly well established by the authorities, and is reasonable and cannot operate injuriously to any one. The question then is, whether the defendants have in their hands any money which in equity and good conscience belongs to the plaintiffs. It is proved satisfactorily that the money borrowed by the defendants of Parkhurst was the money of the plaintiffs in his hands as their agent; but of this fact the defendants had no knowledge at the time of the loan. It was therefore a lawful contract between the defendants and Parkhurst; and if the case had stopped here, it would be very clear that this action could not be maintained. For although it is true, that the sale by an agent, without authority, of property other than money may be disavowed, and set aside in the case of a bona fide purchaser, yet in respect to money the law is otherwise; not only because money has no ear mark and cannot be easily identified, but because a different doctrine would be productive of great mischief. It is, therefore, manifest that before the defendants were notified, that the money lent was the money of the plaintiffs, they were liable only to Parkhurst, or if they had received the money in payment of their debt against Parkhurst, this action could not be maintained, even after notice to the defendants, that the money belonged to the plaintiffs. The only question therefore is, whether after notice the defendants could

[12] If the agent exchanges the principal's property, the property for which it is exchanged becomes the principal's property, and he may recover it from a third party who has taken it in good faith from the agent, and is not compelled to set off a debt of the agent to the third party. Stevenson v. Kyle, 42 W. Va. 229, 24 S. E. 886, 57 Am. St. Rep. 854 (1896).

lawfully detain the money; and we are of opinion that they could. As Parkhurst was indebted to them in a sum exceeding the loan, they had a legal right of set-off as against Parkhurst, of which they could not be deprived by the intervention of the plaintiffs' claim; and however disingenuous the defendants' conduct may be considered in relation to Parkhurst, they had a legal right thus to secure their own debt. Their refusal to repay the loan according to agreement was a breach of promise; but against this the defendants could set off a breach of promise by Parkhurst, and this set-off is allowed by law. The defendants, therefore, had a legal right to appropriate the money lent, to the payment of their own debt. This distinguishes the present case from that of Mason v. Waite, where the money came into the defendant's hands unlawfully, and he had no legal or equitable right to retain it ; and also from that of Clarke v. Shee, Cowp. 200. But the law is laid down by Lord Mansfield, in the latter case, is decisive against the plaintiffs' claim. "Where money or notes," it is said, "are paid bona fide, and upon a valuable consideration, they never shall be brought back by the true owner; but where they come mala fide into a person's hands, they are in the nature of specific property; and if their identity can be traced and ascertained, the party has a right to recover."[13]

Motion to set aside the nonsuit overruled.

DEAN v. PLUNKETT.

(Supreme Judicial Court of Massachusetts, 1884. 136 Mass. 195.)

Contract on account annexed to recover $1,608.91, and interest, for goods sold and delivered. Judgment for $119.91. Plaintiffs appeal.

DEVENS, J.[14] In Locke v. Lewis, 124 Mass. 1, 26 Am. Rep. 631, the authorities, which were found to be to some extent conflicting, were carefully examined; and it was held that a sale by a partner, in

[13] As to money deposited in a bank in such a way as to show the bank that it does not belong to the depositor personally, see Baker v. N. Y. Nat. Exch. Bank, 100 N. Y. 31, 2 N. E. 452, 53 Am. Rep. 150 (1885), in which the money was deposited in the name of "Wilson & Bro., Agents." See, also, Nat. Bk. v. Ins. Co., 104 U. S. 54, 26 L. Ed. 693 (1881), in which the bank knew the money deposited by the agent belonged to the principal; Union Stock Yards Bank v. Gillespie, 137 U. S. 411, 11 Sup. Ct. 118, 34 L. Ed. 724 (1890); and Central Stock & Grain Exchange v. Bendinger, 109 Fed. 926, 48 C. C. A. 726, 56 L. R. A. 875 (1901), in which defendant accepted the principal's money for an illegal purpose.

Even though the money be deposited in the agent's name, and remain in his account, the principal is entitled to reclaim it from the bank as against the general creditors of the agent. Roca v. Byrne, 145 N. Y. 182, 39 N. E. 812, 45 Am. St. Rep. 599 (1895), affirming 68 Hun, 502, 22 N. Y. Supp. 1039 (1893); Scott v. Surman, Willes, 400 (1742). This is so even though some of the agent's money be mingled with the money of the principal. Van Alen v. Am. Nat. Bank, 52 N. Y. 1 (1873).

[14] Part of the opinion is omitted.

payment of his own debt, of goods which were in fact the goods of the partnership, but which the partnership has so entrusted to him as to enable him to deal with them as his own, and to induce the public to believe them to be his, and which the creditor received in good faith and without notice that they were the goods of the partnership, was valid against the partnership and its creditors. No distinction in favor of a partnership can be made where such a transaction is the act of an agent who is not a partner, to whom goods have been similarly entrusted as the case rests upon the principles of agency. "All the authorities agree," says Chief Justice Gray, "that when a person, entrusted with goods as agent, sells them to one who has no knowledge that he is agent, but is led to believe, from the manner in which he has been allowed to deal with the goods, that they are his, the other party to the transaction may set off against the principal a debt of the agent." 124 Mass. 7, 26 Am. Rep. 631.

The principle thus established goes far in disposing of the case at bar. The plaintiffs are the widow and two of the children of Horatio N. Dean, who, in company with another child, his son Ransom B. Dean, had carried on business at Adams under the name and style of H. N. Dean & Son. Upon the decease of Horatio N. Dean, in August, 1872, Ransom B. Dean, who also was the administrator of his estate with the will annexed, continued the business, under the same name and style, as surviving partner, for the benefit of himself and those interested in his father's estate. The defendants, who, at some time prior to June, 1877, made the contract with him by which they bought the goods, the price of which is sought to be recovered in this action, believed that he was in reality, as in appearance, then carrying on said business, as he had done for the first few months, as surviving partner, for the benefit of those interested in the estate. In fact, an arrangement had been made in 1875, by which the plaintiffs had agreed to continue and prosecute the business at Adams as copartners under the name of H. N. Dean & Son, which was the name and style of the original firm, and had constituted Ransom B. Dean their agent and attorney to conduct it. There was no intentional concealment of these circumstances, but no public notice of them was given; and the finding of the auditor necessarily determines that they were unknown to the defendants when they made their agreement with Ransom B. Dean, and when they received from him the disputed items of the account in suit. There were certain items delivered to the defendants before this agreement, their liability for which the defendants do not dispute, and which are not here considered.

The plaintiffs, assuming the name and style of the old firm, under which, as surviving partner, Ransom B. Dean was entitled to and had carried on the business, neglecting to give notice of their purchase of or interest in it, entrusting to him all the property and its manage-

ment (they residing elsewhere and without the State), and permitting him in appearance to continue to conduct the business as surviving partner, cannot compel those who honestly purchased goods of him as such, and in ignorance of his agency, to pay or account for them except in the manner agreed upon with him.[15] * * *

Judgment affirmed.

SECTION 3.—IN TORT

PATTISON v. BARNES.

(Supreme Court of Judicature of Indiana, 1866. 26 Ind. 209.)

Complaint by Pattison against Barnes alleging that he had employed an agent to pay and compromise debts due to and from a partnership, of which plaintiff had been a member; that to deceive and defraud plaintiff, defendant falsely represented to the agent that plaintiff was indebted to him in a large sum, thereby inducing the agent to compromise the debt by a payment of $250; that defendant well knew plaintiff did not owe him in any way, either personally or as a member of any firm; wherefore he prays judgment. Defendant demurred, and the demurrers were sustained. Plaintiff excepts and appeals to this court.

ELLIOTT, J.[16] * * * No brief has been furnished us by the appellee. The paragraphs were demurred to separately, for the reason that neither stated facts sufficient to constitute a cause of action. We are not advised of the particular objection which the court below regarded as fatal to the complaint, but it is said in the brief of the appellant's counsel, that it was insisted by the counsel for the defendant that the suit should have been brought by the agent upon whom the fraud was practiced, and that the plaintiff's remedy was against

[15] Accord: Nixon v. Brown, 57 N. H. 34 (1876), in which the agent bought a horse and took a bill of sale in his own name. The principal allowed him to have the possession of the horse and keep the bill of sale. The agent sold the horse to defendant. Cf. Gussner v. Hawks, 13 N. D. 453, 101 N. W. 898 (1904), in which the court held that the principal could not be divested of the ownership of his property, without his consent, unless by his conduct he had estopped himself to assert his ownership, as against an innocent purchaser.

Clearly if the third person is charged with knowledge of the source of the fund paid over by the agent, he cannot dispute the principal's right. Riehl v. Evansville Foundry Ass'n, 104 Ind. 70, 3 N. E. 633 (1885); Whitley v. Foy, 59 N. C. 34, 78 Am. Dec. 236 (1860), in which the court says the principal may reclaim his property unless it has been transferred bona fide to a purchaser of it, or his assignee, for value without notice. This is true as to money or negotiable paper, but there can be no holder for value without notice of other property exchanged unless upon the ground of estoppel. The property in the case was money. As to negotiable paper, see Winship & Bro. v. Merchants' Nat. Bank, 42 Ark. 22 (1883).

[16] Part of the opinion is omitted.

his agent, and not against the defendant. It may be that the plaintiff could recover against the agent, as the money was not paid on a claim existing against the plaintiff. Be that as it may, we think it clear that the facts stated in either paragraph of the complaint show a valid cause of action in favor of the plaintiff against the defendant. Each paragraph charges the defendant with obtaining the plaintiff's money from his agent by fraud and deceit, willfully practiced upon him for that purpose. The fraud thus perpetrated on the agent was a fraud on the principal, as the money obtained by means of the fraud was the property of the principal, and he is therefore entitled to his remedy directly against the wrong-doer.[17] We see no valid objection to either paragraph of the complaint, and think the court erred in sustaining the demurrers.

The judgment is reversed, with costs, and the cause remanded, with instructions to the court below to overrule the demurrers to the second and third paragraphs of the complaint, and for further proceedings.

GILMORE v. NEWTON.

(Supreme Judicial Court of Massachusetts, 1864. 9 Allen, 171, 85 Am. Dec. 749.)

Tort for the conversion of a horse, which plaintiff, the owner, let to one Barrows, and which the latter exchanged with defendant for another horse. To an instructed verdict for plaintiff, defendant alleged exceptions.

METCALF, J. We cannot sustain these exceptions. The authorities are decisive that the defendant converted to his own use the plaintiff's horse by taking an assignment and possession of him from a person who had no authority to dispose of him, and subsequently exercising dominion over him. Stanley v. Gaylord, 1 Cush. 546, 48 Am. Dec. 643, and cases there cited; Riley v. Boston Water Power Co., 11 Cush. 11; Williams v. Merle, 11 Wend. 80, 25 Am. Dec. 604; Riford v. Montgomery, 7 Vt. 418; Courtis v. Cane, 32 Vt. 232, 76

[17] When the third person deceives the agent, the law will treat the principal as deceived. Perkins v. Evans, 61 Iowa, 35, 15 N. W. 584 (1883); Cramer v. Wright, 15 Ind. 278 (1860); Ward v. Borkenhagen, 50 Wis. 459, 7 N. W. 340 (1880).

The liability will be the clearer where the third person connives with the agent to defraud the principal. White Sewing Mach. Co. v. Betting, 46 Mo. App. 417 (1891). And it will not matter that the principal might have recovered from his agent. Kingman v. Pierce, 17 Mass. 247 (1821); Bertholf v. Quinlan, 68 Ill. 297 (1873). Any profit the third person has made thereby he holds for the principal, who may recover it in a tort action. Boston v. Simmons, 150 Mass. 461, 23 N. E. 210, 6 L. R. A. 629, 15 Am. St. Rep. 230 (1890); Mayor of Salford v. Lever, [1891] 1 Q. B. 168, 60 L. J. Q. B. 39, 63 L. T. 658, 39 W. R. 85, 55 J. P. 244; Grant v. Gold, etc., Syndicate, [1900] 1 Q. B. 233, 69 L. J. Q. B. 150, 82 L. T. 5, 16 T. L. R. 86, 48 W. R. 280.

Am. Dec. 174. In McCombie v. Davies, 6 East, 540, Lord Ellenborough said: "According to Lord Holt, in Baldwin v. Cole, 6 Mod. 212, the very assuming to one's self the property and right of disposing of another man's goods is a conversion; and certainly a man is guilty of a conversion who takes my property by assignment from another, who has no authority to dispose of it." [18]

The defendant admits that although he had no notice that the horse was stolen, yet he acquired no title to him. But he objects to the maintenance of this action, because no demand of a delivery of the horse to the plaintiff was made and refused before the action was commenced. And he cites, among other books, 2 Greenl. Ev. § 642, where it is said that "a mere purchase of goods, in good faith, from one who had no right to sell them, is not a conversion of them against the lawful owner, until his title has been made known and resisted." This position, though not supported by the cases referred to by Mr. Greenleaf, may be sustained by other cases. And not only are there decisions that "a mere purchase" of property, without taking possession of it, is not a conversion of it, but also decisions that a purchase, receiving a pledge, or other bailment, etc., of property from one who had no right to dispose of it, and taking possession thereof, without any further act of dominion over it, does not always constitute a conversion of it. But we need not discuss this class of

[18] Accord: Velsian v. Lewis, 15 Or. 539, 16 Pac. 631, 3 Am. St. Rep. 184 (1888), in which the court said: "At first blush, it may seem strange that one who takes possession of goods or chattels under a contract of purchase from one who had no right to sell should be treated as a wrong-doer, but the explanation of the principle lies in the common-law maxim caveat emptor, which applies to the transfer of personal property. It is the buyer's own fault if he is so negligent as not to ascertain the right of the vendor to sell, and he cannot successfully invoke his bona fides to protect himself from liability to the true owner, who can only be divested of his rights or title to his property by his own act, or by the operation of law. Every person is bound at his peril to ascertain in whom the real title to property is vested, and, however much diligence he may exert to that end, he must abide by the consequences of any mistake. Gilmore v. Newton, 9 Allen, 171, 85 Am. Dec. 749: Spraights v. Hawley, 39 N. Y. 441, 100 Am. Dec. 452; Hotchkiss v. Hunt, 49 Me. 213. Nothing can be plainer than that no one can sell a right when he himself has none to sell, and that every such wrongful sale, by whomsoever made, whether by thief or bailee, acts in derogation of the rights of the owner, and in hostility to his authority, and consequently can neither acquire themselves, nor confer on the purchaser any right or title of such owner. Mere possession of another man's property affords no evidence that the person having such possession has power to sell it, and he who purchases or intermeddles with it must see to it that he is protected by the authority of one who has power to sell. Dixon v. Caldwell, 15 Ohio St. 412, 86 Am. Dec. 487; Spraights v. Hawley, supra; Cooper v. Newman, 45 N. H. 339. A possession taken under a purchase from one without title, and who has himself been guilty of a conversion in disposing of the goods or chattels, is a possession unauthorized and wrongful at its inception, and which the absence of evil intent in the purchaser cannot make rightful or lawful. Such a possession is based on the assumption of a right of property, or a right of dominion over it, derived from the contract of sale; and what is this in the legal sense but a wrongful intermeddling or asportation or detention of the property of another?"

See, also, Holton v. Smith, 7 N. H. 446 (1835).

cases, for no one of them sustains the defendant's objection; for his is a case not only of receiving an assignment and taking possession of the horse, but also of afterwards exercising dominion over him by bailing him to a third person. See Leonard v. Tidd, 3 Metc. 6; Fernald v. Chase, 37 Me. 292; Billiter v. Young, 6 El. & Bl. 41.

Demand and refusal are never necessary as evidence of conversion, except when the other acts of the defendant are not sufficient to prove it; nor are they evidence of it, when, as in this case, it was not in the power of the defendant to deliver the property when demanded. Besides, after property has been converted, a delivery of it to the owner, on demand by him will not bar or defeat an action for the conversion, but will only mitigate damages. A demand on the defendant for the horse was therefore needless for the plaintiff, and would have been useless to the defendant.

Exceptions overruled.

JONES & JETER v. BLOCKER.

(Supreme Court of Georgia, 1871. 43 Ga. 331.)

WARNER, J. The plaintiffs brought an action against the defendants to recover damages for persuading, enticing and procuring one William Powell to leave their employment. The plaintiffs allege, in their declaration, that on the 5th day of January, 1871, they entered into a contract, for a valid and legal consideration, with Powell, to work for them on their farm in Early county, for the year 1871; that subsequently to the making of said contract, the defendants maliciously persuaded, enticed, procured, and caused the said Powell to break his contract with plaintiffs, leave their employment, and to go into the employment of defendants, knowing at the time they did so that said Powell was under contract with the plaintiffs as before stated, whereby they were damaged $500.00. The defendants demurred to the plaintiffs' declaration, as not being sufficient in law to entitle them to recover, which the court sustained, and dismissed the plaintiffs' action, whereupon the plaintiffs excepted.

It was said by Blackstone "that the retaining another person's servant during the time he has agreed to serve his present master, as it is ungentlemanlike, so it is also an *illegal* act. For every master has, by his contract, purchased for a valuable consideration the service of his domestics, for a limited time, the inveigling or hiring of his servant, which indorses a breach of this contract is, therefore, an injury to the master; and for that injury the law has given him a remedy by a special action on the case:" 3d Blackstone's Commentaries, 142. The same principle is applicable where one man employs a laborer to work on his farm, and another man, *knowing* of such contract of employment, entices, hires, or persuades the laborer to

leave the service of his first employer during the time for which he was so employed.[19] It was error in the Court below to sustain the demurrer to the plaintiffs' declaration, and dismissing the same.

Judgment reversed.

[19] Accord: Hart v. Aldridge, Cowper 54 (1774), per Lord Mansfield.

The same rule applies when the principal is deprived of the services of his agent by a wrongful imprisonment of the agent by a third person. Woodward v. Washburn, 3 Denio, 369 (1846), and when the agent by threats and intimidation is induced to break his contract. Doremus v. Hennessy, 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, 43 L. R. A. 797, 802, 68 Am. St. Rep. 203 (1898), attempting to distinguish the famous English case of Allen v. Flood, [1898] A. C. 1, 67 L. J. Q. B. 119, 77 L. T. 717, 46 W. R. 258. Cf. Bourlier v. Macauley, 91 Ky. 135, 15 S. W. 60, 12 Ky. Law Rep. 737, 11 L. R. A. 550, 34 Am. St. Rep. 171 (1891). The agent must be under a contract which he is induced to break to the injury of the principal. Walker v. Cronin, 107 Mass. 555 (1871). The principle extends to every grade of service from the most brilliant, best paid, to the most homely. Haskins v. Royster, 70 N. C. 601, 16 Am. Rep. 780 (1874). The leading case of Lumley v. Gye, 2 El. & Bl. 216, 75 E. C. L. 216 (1853).

PART IV

ACTIONS[1]

CHAPTER I

THE FORM

LOVELESS v. FOWLER.

(Supreme Court of Georgia, 1887. 79 Ga. 134, 4 S. E. 103, 11 Am. St. Rep. 407.)

BLECKLEY, C. J. There was a bailment of goods to be sold for cash. The bailee sold a part on a credit, and a part remained unsold. He paid the bailor for a portion of them. The bailor then brought trover against him, requiring bail under the statute applicable to such actions. Pending the action, the defendant died, and his administrator was made a party. The alleged value of the stock was $1,156.43, but how much was sold, unsold, or paid for does not appear.

1. There was authority to sell, and, that being so, the sale on a credit was a mere violation of instructions as to the terms of sale. Such a sale would pass title, unless the purchaser knew of the violation of instructions, and a sale which passes title is not a conversion, though it may be an abuse of authority. It is like selling at a less price than that named in the agent's instructions. The Broker's Case (Clark v. Cumming), 77 Ga. 64, 4 Am. St. Rep. 72, is not in point. A sale on credit by an agent in possession of the goods, and authorized to sell for cash only, is not a conversion; certainly not, unless it appear that the purchaser had notice of the limitation in the agent's instructions.

2. The proper remedy against such agent is not trover, but an action on the case for violation of instructions or breach of contract; and in the present instance the class of remedy is material, for in trover bail is requirable, but in an action for breach of contract, or for disobeying instructions, it would not be.

[1] The ordinary rules of pleading and practice, of course, govern in actions growing out of the agency relation, and need no special consideration in a book on Principal and Agent. The cases in Part IV are chosen to illustrate rules which are peculiar to agency, or which take on a peculiar color or interest in agency problems. Many of the cases, supra, of course, illustrate incidentally rules of pleading and practice, and may now profitably be reexamined from this standpoint.

3. Ruling, as we do, that the credit sale was not a conversion, either of the whole stock or the part sold, and no demand appearing as having been made prior to the commencement of the action, we see no evidence in the record of any conversion at all on which to base a recovery. Unless an actual conversion by a bailee be shown, an action of trover against him will not lie, without a previous demand for the goods, and failure to redeliver.

4. In the argument here it was said that a demand could and would have been proven had the court not prematurely granted a nonsuit on the agreed statement of facts. We are thus called upon to construe the statement, so as to see whether the court below interpreted it correctly. The parties went to trial on a statement as to what evidence the plaintiff would introduce, and on which he based his right to recover; which statement was that the goods, of the alleged value of $1,156.43, were delivered by plaintiff to defendant to be sold for cash, and plaintiff and defendant were to divide the profits, and the goods not sold were to be redelivered to plaintiff, and that plaintiff proposed to prove only that defendant sold a part of the goods, and sold them for credit, and paid plaintiff for a portion of them, and there can be no identification of the goods sold or not sold, but plaintiff can only show that goods were turned over to defendant. This statement conceded that plaintiff could prove the facts recited therein, and them only, and was a virtual admission that no demand for the goods, or any of them, prior to the institution of the suit, could be established; and the object of the statement being that the court might determine the law arising upon the recited facts, though they alone were in evidence before the jury, there was no error in ordering a nonsuit.

Judgment affirmed.

McMORRIS v. SIMPSON.

(Supreme Court of Judicature of New York, 1839. 21 Wend. 610.)

Action of trover. Defendant went to market with his own butter, and also took some for plaintiff, a neighboring farmer. He could not sell it in New York City, and so shipped it South. There was evidence of usage and custom and of the broad powers given by plaintiff. The trial judge charged that he was bound to sell in New York and not elsewhere. Motion to set aside a verdict for plaintiff.

BRONSON, J.[2] [After holding that the judge was not on the evidence justified in so charging the jury:] * * * The question whether, in any view of the case, this action of trover can be maintained, was discussed on the argument, and as that point may arise on another trial, it will be proper to give it some consideration. The most usual remedies of a principal against his agent are the action

[2] Part of the opinion is omitted.

of *assumpsit,* and a *special action on the case;* but there can be no doubt that trover will sometimes be an appropriate remedy. That action may be maintained whenever the agent has wrongfully converted the property of his principal to his own use; and the fact of conversion may be made out, by showing either a demand and refusal, or that the agent has, without necessity, sold or otherwise disposed of the property contrary to his instructions. When an agent wrongfully refuses to surrender the goods of his principal, or wholly departs from his authority in disposing of them, he makes the property his own, and may be treated as a tort-feasor. But there must be some *act* on the part of the agent—a mere *omission* of duty is not enough, although the property may be lost in consequence of the neglect. Nor will trover lie where the agent, though wanting in good faith, has acted within the general scope of his powers. There must, I think, be an entire departure from his authority before this action for a conversion of the goods can be maintained. The following cases will be found to support these positions. Lyeds v. Hay, 4 T. R. 260; Murray v. Burling, 10 Johns. 172; Yaul v. Harbottle, Peake's Cas. 49; Severin v. Keppell, 4 Esp. R. 156; Anon., 2 Salk. 655; Packard v. Getman, 4 Wend. 613, 21 Am. Dec. 166; Bromley v. Coxwell, 2 Bos. & Pul. 438; Owen v. Lewyn, 1 Vent. 223. Catlin v. Bell, 4 Camp. 183, was an action of assumpsit, but trover might, perhaps, have been maintained.

In the case at bar, if the defendant was limited to a sale in the city of New York, and not elsewhere, the delivery of the property to a third person to be disposed of in another market, would, I think, be a conversion.[3] But there must be a new trial, on the ground that the case belongs to the jury.

New trial granted.

[3] See, also, Murray v. Burling, 10 Johns. 172 (1813).

Whether the action against an agent may be trover, or must be based upon his obligation, is a difficult question. If his wrong is simply a failure properly to perform his agency, the action should be based on the obligation. If the wrong is an invasion of the rights of the owner which exists independent of the contract, the action is not founded on the contract, and could be sustained whether the contract existed or not. Trover lies. Cotton v. Sharpstein, 14 Wis. 226, 80 Am. Dec. 774 (1861); Laverty v. Snethen, 68 N. Y. 522, 23 Am. Rep. 184 (1877). See, also, ante, pp. 594, 597.

When the principal is entitled to receive, and the agency contract requires the agent to pay over, the identical money received, trover lies for its conversion. In other cases the principal and agent are merely debtor and creditor, and a contract action lies. Salem Traction Co. v. Anson, 41 Or. 562, 67 Pac. 1015, 69 Pac. 675 (1902).

When the agent has converted his principal's property, the latter has his election to sue in tort for the trespass and asportation, or, if he can come at the property, to sue in replevin for its recovery, or to waive the tort, and sue in assumpsit upon the fiction that the agent has disposed of property, and has promised to pay for it. Harter Co. v. Pearson, 26 Ohio Cir. Ct. R. 601 (1904); Schick v. Suttle, 94 Minn. 135, 102 N. W. 217 (1905); McCrillis v. Allen, 57 Vt. 505 (1885). The action on assumpsit for money had and received is based on the assumption that the money has been received, or the agent has received some benefit from the transaction as a credit on his account.

ASHLEY v. ROOT.

(Supreme Judicial Court of Massachusetts, 1862. 4 Allen, 504.)

CHAPMAN, J. The instruction to the jury that the plaintiff was not entitled to recover in this action the sum of $2250 collected by the defendants and in their hands as his agents was erroneous. The defendants' counsel contends that it was correct, because the declaration is in tort, and this sum can only be recovered in an action of contract. It is true that the declaration is in tort. It alleges among other things that the defendants were the agents of the plaintiff, and as such undertook to collect and secure a certain note of $2500; that they collected the sum of $2250 on the note, and lost the balance, and refused to pay over the money collected upon the plaintiff's demand, and that their conduct was negligent and fraudulent and a breach of their duty as agents.

This is one of the numerous classes of cases where a party may elect to sue either in contract or tort. At common law he might sue in assumpsit for breach of contract, or in case for breach of duty. The general rule is well stated in Courtenay v. Earle, 10 C. B. 73, that where there is an employment, which employment itself creates a duty, an action on the case will lie for a breach of that duty, although it may consist in doing something contrary to an agreement made in the course of such employment, by the party on whom the duty is cast. See also Church v. Mumford, 11 Johns. 479, where the doctrine is applied to the case of a breach of duty by an attorney; and Howe v. Cook, 21 Wend. 29; Gilbert v. Williams, 8 Mass. 51, 5 Am. Dec. 77; Dearborn v. Dearborn, 15 Mass. 316; Dwight v. Brewster, 1 Pick. 50, 11 Am. Dec. 133. The jury should have been instructed that the plaintiff could recover in an action of tort for all the injury which had been caused by the defendants' breach of duty, whether in the loss of security or the neglect to pay over on demand the money which they had collected as his agents.

The proof of the statutes of Iowa was in conformity with the provision of Gen. St. c. 131, § 63.

As to certain other questions argued in respect to the admission of testimony, they may not arise upon a new trial, and therefore it does not seem to be necessary to decide them.

Exceptions sustained.

It does not lie when no money or credit has yet passed from the third person to the agent. Rowland v. Barnes, 81 N. C. 234 (1879). See, also, Lindley v. Downing, 2 Ind. 418 (1850); Challiss v. Wylie, 35 Kan. 506, 11 Pac. 438 (1886). Having made his election the principal must abide by the choice with all its consequences. Colt v. Stewart, 50 N. Y. 17 (1872), in which the principal sued in assumpsit, and therefore had to allow a counterclaim by the agent.

KING v. ROSSETT.

(Court of Exchequer, 1827. 2 Younge & Jervis, 33.)

Bill against stock-brokers for an accounting. It prayed a discovery; an account of the true prices at which the stock was sold and purchased; and an injunction to restrain proceedings at law which the agents were taking for a balance they claimed to be due from plaintiff. The agents had rendered plaintiff an account, showing a balance due them of £625. Plaintiff claimed this was erroneous and inaccurate, and that they really owed him £1000. Defendants put in a general demurrer for want of equity.

ALEXANDER, L. C. B.[4] I can entertain no doubt whatever as to the course which ought to be pursued in this case, and am clearly of opinion that the demurrer should be allowed. The bill is filed by a principal against his agents, and it is said that that fact alone is sufficient to sustain the bill. Undoubtedly, a principal is entitled to an account from his agent, and may apply to a Court of Equity for that purpose; but, as I conceive, before that Court will interfere, a ground for its interposition must be laid, by showing an account which cannot fairly be investigated by a Court of Law. Unless Courts of Equity were to put that limit to their interference, no case of this description would ever be tried in a Court of Law, and wherever a person was entitled to a set-off, a bill might be sustained.[5] * * * Demurrer allowed with costs, according to the practice of the Court.

VILWIG v. BALTIMORE & O. R. CO.

(Supreme Court of Appeals of Virginia, 1884. 79 Va. 449.)

Bill against Vilwig and Worthen for a discovery on oath by Worthen of his receipts and credits as agent of the company, to determine the amount for which Vilwig was liable as surety on Worthen's bond.

HINTON, J.[6] The bill charges that this company, a short time prior to January 13, 1875, appointed one B. H. Worthen its agent in Winchester; that the scope of his agency extended from Harper's Ferry

[4] Part of the opinion is omitted.

[5] A claim, in effect, merely for damages for breach of a contract, or accounts all on one side, is appropriately disposed of at law, and equity will not take jurisdiction. Paton v. Clark, 156 Pa. 49, 27 Atl. 116 (1893). The same thing is true of a mere money demand, Barry v. Stevens, 31 Beav. 258, 31 L. J. Ch. 785, 6 L. T. Rep. N. S. 568, 9 Jur. N. S. 143, 10 W. R. 822, 54 Eng. Repr. 1137 (1862), and of a simple though long account of transactions by an agent upon fixed terms, or for a definite compensation. Goddin v. Bland, 87 Va. 706, 13 S. E. 145, 24 Am. St. Rep. 678 (1891).

See, also, the leading case of Foley v. Hill, 2 H. L. Cas. 28, 9 Eng. Repr. 1002 (1848), affirming 8 Jur. 347, 13 L. J. Ch. 182, 1 Phil. 399, 19 Eng. Ch. 399, 41 Eng. Repr. 683 (1843).

[6] Part of the opinion is omitted.

to Strasburg, subject to subordinate agencies at certain intermediate points on the line of the road. That Worthen gave bond on the 13th January, 1875, with (the appellant) John Vilwig as his surety in the penalty of $3,000, conditioned for the faithful performance of his duties as such agent. That Worthen's agency terminated on the 10th March, 1875, and that there was then due to the company a sum "of not less than $1,140.39 with interest, etc., after allowing all credits." The bill also alleges that Worthen had received as agent of the company large amounts of money for which he had not accounted, and that no full settlement could be had with him until he should make a full disclosure on oath as to "the receipts and credits" during these periods. It then prays for a discovery, an account, and for general relief. In May, 1879, more than three years after the plaintiff had been required by the court to furnish the defendants with copies of all papers pertaining to the office of the agent at Winchester, during the period covered by the bond of Worthen and Vilwig, for the purpose of aiding them in making their answer, and more than two years after an account had been ordered, Vilwig filed an answer, which is not sustained by the proofs however, in which he reserves the right to demur to the bill. And in November, 1883, more than eight years after the filing of the bill, Worthen filed an answer in which he demurs to the bill, "pleads want of jurisdiction in the court," and denies that any discovery is needed from him or that he had at any time received any money as agent for which he had failed to render a full account.

Now, assuming for the purposes of the case, what is certainly not beyond dispute, that it was competent for the defendant to plead to the jurisdiction of the court at the time he did, and after he had submitted to its jurisdiction for so long a time, and in some instances invoked its powers, we proceed to consider the first error assigned upon this appeal, viz.: The bill should have been dismissed for want of jurisdiction. The bill in this case, it will be observed, is not a technical bill of discovery, or, as it is sometimes called, a pure bill of discovery, that is, a bill filed for the purpose of enforcing discovery in aid of proceedings before some other tribunal, but is a bill for discovery and relief; that is, it is a bill in equity calling for a discovery. In this sense, "every bill in equity" may properly be deemed a bill of discovery, since it seeks a disclosure from the defendant, on his oath, of the truth of the circumstances constituting the plaintiff's case, as propounded in his bill. 2 Story's Eq. § 1483. The bill in this case not being then the technical bill of discovery, the cause did not necessarily terminate with the failure to obtain the discovery, and it was competent for the court, the bill being for an account as well as a discovery, to go on and determine the matter of controversy, if an account was needed for a proper decision of the case. For, as courts of equity have jurisdiction in the case of trustee and cestui que trust, where the cestui que trust demands an account of moneys received under the trust under the gen-

eral equity for enforcement of trusts, so "a corresponding equity exists as against an agent or steward, or a person in any similar character, who is bound by his office to render regular accounts. And if he fails to render such accounts, his employer will have an equity, arising out of the agent's failure of duty to have the accounts taken in the court of chancery, where the evidence may be supplied by discovery on oath." "This equity does not originate," says Adams, "in the mere want of discovery, which will not * * * confer a jurisdiction for relief, but in the additional ingredient, that such want has been caused by the defendant's fault." Adams' Eq. §§ 220, 221.

In Coffman v. Sangston, 21 Grat. 263, this court said: "The jurisdiction of courts of equity in matters of account involving the transactions and dealings of trustees and agents is now well established. Not that the bare relation of principal and agent justifies the interference of the court in every case, but whenever it appears that a discovery is necessary, or that there are mutual accounts between the parties, or the remedy at law is not plain, simple and free from difficulty, the equitable jurisdiction attaches." Zetelle v. Myers, 19 Grat. 62; Segar v. Parrish, 20 Grat. 680; Simmons v. Simmons' Adm'r, 33 Grat. 451. Within this category the case in hand clearly falls. It is a case requiring an investigation of the complicated account of an agent occupying a position of confidence and trust, charged virtute officii with the duty not only of keeping but of rendering regular accounts, and who was the custodian of most, if not of all of the papers and vouchers which showed the receipts and disbursements of his agency. In such cases the remedy at law is not as plain or free from difficulty as it is in equity, and this is strikingly illustrated by the case of Richmond & Petersburg R. R. Co. v. Kasey & al., 30 Grat. 220, where, the action being covenant, both parties found it necessary to have the account taken before a commissioner.[7] In view of what has been said, we cannot doubt that the court of equity properly had jurisdiction of the case. * * *

[7] The equity jurisdiction rests largely upon confidential relations, involving the need of discovery, and the duty of explanation. Marvin v. Brooks, 94 N. Y. 71 (1883); Rippe v. Stogdill, 61 Wis. 38, 20 N. W. 645 (1884). Cf. Makenzie v. Johnston, 4 Madd. 373, 56 Eng. Repr. 742 (1819), which makes the equity jurisdiction very broad, with Moxon v. Bright, L. R. 4 Ch. 292, 20 L. T. Rep. N. S. 961 (1869), and Smith v. Leveaux, 2 De G. J. & S. 1, 9 Jur. N. S. 1140, 33 L. J. Ch. 167, 9 L. T. Rep. N. S. 313, 3 New Rep. 18, 12 W. R. 31, 67 Eng. Ch. 1, 46 Eng. Repr. 274 (1863), limiting its use to cases in which an adequate discovery cannot be had at law. See, also, the general discussion of appropriate actions in Reeside's Ex'r v. Reeside, 49 Pa. 322, 88 Am. Dec. 503 (1865).

UNDERHILL v. JORDAN.

(Supreme Court of New York, Appellate Division, First Department, 1902. 72 App. Div. 71, 76 N. Y. Supp. 266.)

Appeal from special term, New York county.

Action for an accounting by Edward C. Underhill against Nina Jordan and another. From a judgment for defendants, plaintiff appeals. Reversed.

HATCH, J.[8] The learned trial court, in making disposition of the issue of law raised by the demurrer, seems to have based its conclusion upon the ground that the complaint did not plead an equitable cause of action, for the reason that the plaintiff had no lien upon the fund in his hands, and also because he had an adequate remedy at law; and, further, that the complaint could not be sustained as an action at law to recover for services rendered without disregarding the substantial averments of the complaint and the prayer for relief. It is not necessary, in support of the conclusion at which we have arrived, to determine whether the averments of the complaint, coupled with the prayer for relief, state a legal cause of action or not. Nor is it absolutely essential to the maintenance of an equitable action for the relief demanded in this complaint that there should exist a lien upon the fund in plaintiff's hands. It is clear, from the averments of the complaint, that the plaintiff has established that there existed between himself and the defendants the relation of principal and agent of such a character as constituted the plaintiff a quasi trustee for the defendant, and such relation, within the doctrine announced in Marvin v. Brooks, 94 N. Y. 71, would have entitled the defendants to maintain an equitable action to procure an accounting of the plaintiff's acts in dealing with the trust funds intrusted to his care and management. While it is true that the existence of a bare agency is not sufficient upon which the equitable jurisdiction of the court can be invoked, yet where the agent's duties are fiduciary in character, and involve a dealing with trust funds, he is regarded in the law as a quasi trustee, and may be called to account in a court of equity for his management of the trust fund;[9] and in such action judgment may pass determining the respective rights and liabilities of the parties thereto, and adjusting the

[8] The facts and the rest of the opinion are on p. 648.

[9] When the agency is fiduciary, and especially if the legal relief and mode of obtaining it is less efficient, then the jurisdiction in equity attaches in a suit by the agent against the principal. Hapgood v. Berry, 157 Fed. 807, 85 C. C. A. 171 (1907).

As to the agent's remedy in law against the principal, see ante, p. 605 ff.; also, Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819 (1893); Hill v. Thompson, 2 Moore, C. P. 420, 8 Taunt. 371, 4 Eng. Ch. 189 (1818).

As to actions by the third person against the agent, see p. 650 ff.; by the third person against the principal, see p. 724 ff.

respective interests of the parties in and to the trust fund. In the present case the complaint avers in terms that the plaintiff acted for the defendants as agent, factor, and manager, and this averment is accompanied by facts showing wherein and how he managed the estate of the defendants; that from time to time he rendered to them accounts of the conduct of the business, and from time to time paid over money to the defendants arising out of such business, and that there has never been a final settlement and adjustment of accounts between the parties; that in the course of such business the plaintiff has advanced money for expenses connected with his management of the defendants' property, for which he has not been paid; and that the reasonable value of his services is a specified sum, for which he asks to be allowed. The authority which we have cited is clearly decisive of the proposition that the defendants could maintain an equitable action for an accounting based upon these facts. If the defendants could maintain such an action, then it must follow that the plaintiff has the reciprocal right to also maintain an action for the same purpose, as it would be clearly obnoxious to every principle of equity to hold that one party might invoke the aid of equity and that the other could not, although the rights and liabilities of each were governed by and arose out of the same transaction. It is quite evident that the complaint is inartificially drawn, but such fact does not defeat the plaintiff's rights in the premises, and furnishes no ground for a demurrer to his complaint. Enough appears to show the right to the equitable interposition of the court, and this is sufficient to resist the demurrer. Wetmore v. Porter, 92 N. Y. 76. * * *

CHAPTER II

THE PARTIES TO THE ACTION

For cases illustrating actions by the agent against the third person, see p. 701 ff.; by the third person against the agent, p. 650 ff.; by the principal against the third person, ante, p. 791 ff., especially Beebee v. Robert, 12 Wend. 413, 27 Am. Dec. 132, ante, p. 792; by the third person against the principal, ante, p. 724 ff; by the principal against the agent, ante, p. 506 ff.; by the agent against his principal, ante, p. 605 ff.

CHAPTER III

EVIDENCE OF THE AGENCY

SECTION 1.—PRESUMPTION AND BURDEN OF PROOF

SCHMIDT v. SHAVER.

(Supreme Court of Illinois, 1902. 196 Ill. 108, 63 N. E. 655, 89 Am. St. Rep. 250.)

In 1894 appellant, Ida E. Schmidt, by her next friend, obtained a judgment against the city of Chicago for $5,000 for a personal injury. The suit was prosecuted for a contingent fee of one-fourth by a claim corporation, of which one Beck was president. At his suggestion Shaver was appointed guardian of appellant. As appellant was poor, and there was delay in recovering the judgment, the guardian secured a court order to sell it for $4,375. Shaver, through Beck, sold to Perkins, but Perkins did not meet his agreement, and Shaver left the assignment in a vault of the Claim Company with some other papers he had there. Beck took the assignment from the vault and delivered it to Perkins, receiving a check made out to himself. The judgment was further assigned several times, finally coming into the hands of Pearson, one of the appellees. Shaver heard no more about it, and had none of the proceeds. They were misappropriated by Beck. Appellant came of age, and on finding what had been done, brought a bill in equity to set aside all the assignments. Her bill was dismissed for want of equity and she appealed.

CARTWRIGHT, J.[1] * * * The judgment could not be collected at the time, and the court, which had general supervision of the guardian, found that the price offered was a good one under the circumstances. We think the probate court had a right to authorize the sale of the judgment at what it found to be its actual value. The guardian, however, never carried out the order of the probate court, and never delivered the assignment to Perkins, unless Beck was his agent to make the delivery. The rights of Perkins and the subsequent assignees must depend upon establishing an agency in Beck to make the delivery and receive the payment. Upon that question, the burden of proof was upon the defendants, who affirmed the existence

[1] Part of the opinion is omitted.

of the relation of principal and agent between the guardian and Beck.†

There is no presumption of Beck's authority, and one who claims the benefit of a contract made through an agent has the burden of proof when the alleged agency is denied. In order to prove the agency, the defendants were bound to prove an appointment, either express or implied from the circumstances, or that the guardian held Beck out as his agent, with authority to make the delivery and receive the payment. Perkins had notice that Beck was not the owner of the judgment, and was not entitled to the proceeds, but that they belonged to the guardian, and that Beck could only receive them as agent for the guardian, and it was therefore incumbent on him to ascertain what Beck's authority was. The guardian never authorized Beck to deliver the assignment or receive payment, and never knew of the act until it was discovered after his discharge, shortly before this suit was begun. The filing of the assignments with the clerk of the court did not operate as constructive notice to the guardian or appellant. They were not required to be recorded, and were not contemplated by the statute as public records, and would not amount to constructive notice to any one. Wade, Notice, § 119; Bourland v. Peoria Co., 16 Ill. 538; Betser v. Rankin, 77 Ill. 289. The guardian never received any part of the proceeds, and never ratified the sale or the act of Beck in any manner. The mere fact that Beck assumed to act as agent in delivering the assignment and receiving the payment, without the knowledge or subsequent ratification of the guardian, was not sufficient to prove the agency. It is beyond question that the guardian never held Beck out as having authority to receive payment, unless it was by the single act of leaving the assignment for safe-keeping in the vault of a corporation of

† The onus probandi rests on the person setting up an agency, not only as to the fact of the agency, but also as to the scope of the authority. Baker & Co. v. Kellett Chatham Mach. Co. (Tex. Civ. App.) 84 S. W. 661 (1905); Clark v. Jordan, 35 W. Va. 735, 14 S. E. 255 (1891). The burden of proof rests upon the party who asserts the agency, whether he be the third person, Ward v. Trustees M. E. Church, 27 R. I. 262, 61 Atl. 651 (1905), or the agent who is sued personally, and who seeks to escape by proof that he acted as agent, Miller v. Stock, 2 Bailey, 163 (1831); Gillaspie v. Wesson, 7 Port. 454, 31 Am. Dec. 715 (1838).

The weight of evidence need not be strong to uphold a finding by a jury of agency. Noble v. Burney, 124 Ga. 960, 53 S. E. 463 (1906). It is enough if the facts proved show that such was the understanding of the parties. Dull v. Dumbauld, 7 Kan. App. 376, 51 Pac. 936 (1898). But if the presumptions are equal, the proof of the agency fails. Kelly v. Estates of Strong, 68 Wis. 152, 31 N. W. 721 (1887); Ward v. Trustees M. E. Church, 27 R. I. 262, 61 Atl. 651 (1905). Proof of the agency must be clear and decisive. Proudfoot v. Wightman, 78 Ill. 553 (1875). If upon all the facts the jury are in doubt, the verdict must be against the agency. Beals v. Merriam, 11 Metc. (Mass.) 470 (1846). This is the more so if the facts are inconsistent with the agency. Stratton v. Todd, 82 Me. 149, 19 Atl. 111 (1889). The importance of this rule as to the onus probandi is well set forth in the celebrated dissenting opinion of Lord Cranworth in Pole v. Leask, 33 L. J. Ch. 155, 9 Jur. N. S. 829, 8 L. T. 645 (1862), ante p. 49.

which Beck was the manager, and the only reason Perkins had for assuming that Beck was the agent of the guardian was that he had possession of the assignment. Beck was not an attorney or broker, and the sale of judgments was not within the scope of the usual business carried on by him from which an inference of authority might arise. It is true that, where a person has possession of a promissory note which is due and payable, it may be inferred that he has authority to receive payment of it (Stiger v. Bent, 111 Ill. 328); but authority to receive payment cannot be inferred from possession when the paper is not due (Fortune v. Stockton, 182 Ill. 454, 55 N. E. 367), and the mere possession of personal property does not generally authorize an inference of power as agent to sell it and receive the proceeds. So far as appears Perkins made no inquiry as to Beck's authority, but from the mere possession of the paper dealt with him and paid with a check payable to the order of Beck. He thereby put it in the power of Beck to misapply the proceeds and defraud the guardian. He might have protected himself by inquiry, or by making the check payable to the order of the guardian. There was no previous course of dealing recognized or acquiesced in by the guardian from which authority could be inferred, and no other relation out of which an agency ordinarily arises, and we cannot regard the alleged agency proved by the mere fact that Beck had possession of the assignment.

Neither was there any evidence that the guardian held Beck out as his agent with authority to make the delivery and receive the proceeds. Where one party holds another out as his agent with authority to do an act, he is bound by the act of the agent on the ground of estoppel. The guardian left the assignment with the corporation merely for safekeeping, and Beck possessed himself of it wrongfully, and delivered it in fraud of the rights of the guardian and appellant. Beck knew that he had no authority to deliver the assignment, as is clearly shown by his conduct. He told the guardian eight months after he had received the proceeds that there was no prospect of selling the judgment, and kept informing appellant and her mother that the judgment would probably be paid to them some time in the future. The transaction by Beck was fraudulent, and it was essential for defendants to show that Perkins believed in the existence of, and relied upon, the agency and authority of Beck, and that he had no notice of the fraud. It was agreed by counsel that Pearson would testify that he purchased the judgment from McBean in good faith and for value, and with no knowledge of any defect in McBean's title, and that he was advised of the state of the record. There was no evidence on the same questions as to Perkins, the only evidence being that he gave the check payable to the order of Beck and received the assignment. The equities of the case are with the appellant, and, if Perkins did not get title to the judgment,

those claiming through him obtained none. The judgment was not assignable, and all that could be transferred was an equitable title. Hughes v. Trahern, 64 Ill. 48. The alleged agency of Beck for the guardian was not proved. There was no express appointment or authority conferred or intended to be conferred. There was no previous course of dealing, relation of the parties, usual employment, or other circumstances from which an appointment could be fairly implied. The guardian did nothing which ought to estop him as having held out Beck as his agent. * * *

Reversed and remanded.

WISCONSIN BANK v. MORLEY et al.

(Supreme Court of Wisconsin, 1865. 19 Wis. 62.)

Action to foreclose a mortgage, given by one Aldrich to plaintiff. Aldrich was son-in-law of Morley, and acted as his agent in negotiations with one Miller, president of plaintiff bank, by which Miller paid a debt he owed Morley by conveying certain property, including this land, to Morley. Aldrich wrongfully took the deed in his own name, and gave Miller a mortgage on the land to secure a loan made to him the same day by the bank. Aldrich intended to pay the note before it fell due, but died without doing so. Judgment for defendant.

DIXON, C. J.[2] * * * The admissibility of Morley's testimony being established, the merits of the controversy seem less difficult. There can be no pretense that Aldrich had original authority from Morley to execute the mortgage. Indeed this is scarcely claimed by the bank. The conversation of Morley and his recommendations to Miller at the time he introduced Aldrich in the summer of 1859, amount to nothing by way of establishing such authority. They were mere general words of commendation, employed on occasion of the introduction of a stranger, and not intended nor understood as the grant of authority. Miller, who represents the bank throughout the transaction, took the mortgage knowing that Aldrich was not the owner and that the property was Morley's. He took it without the slightest evidence that Aldrich was authorized by Morley to execute it. It turns out upon trial that Aldrich had no such authority. So far then the mortgage was void as against Morley, and the only ground upon which it can be sustained is that taken by counsel, namely, that Morley subsequently acquiesced in and ratified it. Upon this point it is urged that Miller, in September, 1861, notified Morley that he had made the loan and taken the mortgage, and that Morley waited until September, 1862, before repudiating it, or informing Miller that Aldrich acted without authority. If it be admitted that the case is one where mere silence on the part of Morley,

[2] Part of the opinion is omitted.

after notice from Miller, would constitute a ratification, still I do not think there is any proof to warrant the application of the doctrine. Morley, who admits the receipt of Miller's letter in September, 1861, testifies to nothing of the kind. True, he says he wrote to Aldrich for information respecting it, but he does not say that he did not reply to Miller. Neither does Miller, himself a witness, testify that Morley neglected to answer, or that Morley first informed him of Aldrich's want of authority in September, 1862. Counsel seem to assume the fact because in the series of letters which passed between Morley and Miller, and which were introduced on the part of the bank, the first in which Morley denies the validity of the mortgage was dated in September, 1862. But it is obvious that the letters introduced were not all which passed between the parties. Of those introduced, the first from Morley by no means indicate that he had been slow in repudiating the mortgage. On the other hand it is fairly to be inferred from them, not only that he had replied to Miller's first communication, but that he had informed him that the mortgage was invalid. He speaks of the claim as one which must be collected from Aldrich's estate. And his letter of September, 1862, was written in answer to one from Miller of the first of the same month. Again, Miller's letters tend to the same conclusion. In that of June 11th, 1862, he writes for advice as to what is *then* to be the course taken in regard to Aldrich's affairs in Madison. This by no means indicates that Morley had kept silence, or that he had acquiesced in or acknowledged the validity of the mortgage. But aside from this criticism upon the correspondence, I hold that the fact of ratification, if ratification there was, should be as clearly made out in evidence as that of original authority, in case the bank had relied upon that. In either case the burden of proof is upon the bank.[8] If Morley did not reply to Miller for the space of a year, or if, replying, he did not deny Aldrich's authority or admitted it, the fact was one susceptible of clear and easy proof, and should have been placed in clear light before the court. Miller was upon the stand. He could have testified to it or produced the letters. Morley was upon the stand, and he also might have been questioned. But instead of this, no question of the kind was put to either, and I think there is no evidence in the case authorizing the assumption of the counsel, and that the judgment should be affirmed.

[8] The burden of showing ratification is on him who relies on it. Moore v. Ensley, 112 Ala. 228, 20 South. 744 (1896); Combs v. Scott, 12 Allen, 493 (1866).

SECTION 2.—ADMISSIBILITY

I. In General

LAWRENCE v. WINONA & ST. P. R. CO.

(Supreme Court of Minnesota, 1870. 15 Minn. 390 [Gil. 313], 2 Am. Rep. 130.)

Action for five boxes of household goods destroyed by fire in defendant's warehouse at Waseca. The goods were shipped from Winona and were consigned to Mankato. It was the custom to carry via defendant's line to Waseca and thence by team to Mankato. The team line was operated by one Phelps under an agreement with defendant that if he would run the team line they would give him all Mankato freight from their western terminus, Waseca.

Ripley, C. J.[4] * * * The evidence of Phelps' manner of doing business at Mankato should have been excluded. Unless he was the defendant's agent it was irrelevant; and before the act of B. can be given in evidence as the act of A. it must be proved that B. was the agent of A. Stark. pt. 4, p. 55. The plaintiff claims, indeed, that the evidence in question itself tends to prove this; but the agency of a party must be proved from other evidence than his acts before it can be shown that his acts are binding upon his alleged principal. Scott v. Crane, 1 Conn. 255. B.'s authority to act for A. may be inferred from the habit and course of dealing of A. and B., but not of B. alone, even though his acts be done in A.'s name. Stark. pt. 4, pp. 55, 59. In this case Phelps did not assume to act in the name of the defendants. Plaintiff would infer Phelps' agency from the fact that the way-bill, which he usually left with the goods, was signed by defendants' freight agent, and included a charge for team, as well as railroad charges.

The leaving of the way-bill was Phelps' act; its delivery to him was the act of defendants' freight agent. On its face it purports to be for transportation to Waseca only, and its delivery, receipted by the station agent to Phelps, (it appearing, according to the evidence introduced by plaintiff himself that the freight was delivered to Phelps by the station agent upon his receipting therefor and either paying or becoming personally responsible to defendants for the freight money and back charges due them,) tends of itself to prove that such goods and way-bill were delivered to him not as defendants' employé, but as the agent of the consignees. It appears, however, that these way-bills usually, but not always, included a charge for *"team,"* additional to defendants' dues, which is said,—though of this there is no proof,—to be for hauling from Waseca to Mankato. Whether added by the freight

[4] Part of the opinion is omitted.

agent, and if so, at whose direction or request, or by Phelps himself, does not appear; but, at all events, there is no inference from the circumstances that Phelps received the bill as defendants' agent, to collect the amount for them and on their account, for plaintiff has himself introduced positive testimony that the defendants had no interest in, nor received any part of the moneys received on the transportation of freight between Waseca and Mankato. The evidence of Palmer was inadmissible for the further reason that he testified only to facts occurring after the fire; Phelps' way of doing business at Mankato in May could have no tendency to prove what it was in March. Mead's declarations, though of themselves, indeed, they rather go to show that defendants had no control over the rates of freight between Waseca and Mankato, yet were inadmissible in any view. They did not tend to prove any contract with plaintiff or any usage of defendants. There is no evidence either that the matters in question were within the scope of his agency or that the declarations were in regard to a transportation then depending so as to be a part of the res gestæ. 1 Greenl. Ev. subd. 113.

We think, however, that there is competent evidence in the case tending to show that Phelps was an independent common carrier. In that case defendants were intermediate carriers between Fort Howard and Mankato. If they were, were they under any responsibility to plaintiff at the time of said fire, in respect of such goods? If so, what was it? * * *

The Court found that defendants were liable as common carriers until the goods were delivered to Phelps, and on this ground affirmed the judgment of the district court.

LYONS v. THOMPSON.

(Supreme Court of Iowa, 1864. 16 Iowa, 62.)

WRIGHT, C. J.[5] Plaintiff seeks to recover for the value of certain goods delivered to A. B. Olmsted & Co.

Upon the trial, certain orders were introduced, signed by Boyles and others, and defendants objected to their introduction for the reason that they were not signed by Olmsted & Co. Plaintiff thereupon offered to, and did prove by parol, that the persons signing said orders, in giving the name, acted for and as the agents of said company. This testimony was objected to, upon the ground that as the agency did not appear upon the face of the orders, and the principal was not disclosed, the testimony was incompetent; and the admission of this testimony is the first error demanding our attention.

That the authority of an agent, except in special cases, may be shown by parol, cannot admit of doubt. 2 Greenl. § 61. The case be-

[5] Part of the opinion is omitted.

fore us does not fall within any of the exceptions. Not only so, but the appellants mistake the application of the rule for which they contend. The question is not, whether the persons signing the orders might not be made liable personally for the goods delivered thereon, but whether it can be shown by parol that they were acting at the time as the clerks or agents of and for Olmsted & Co.

If an individual is in the habit of giving orders or directions in relation to the delivery of goods or any thing else by a clerk, there is no rule violated in allowing the fact of agency to be shown by parol. The question is, were the goods delivered to or for a particular person. To establish such delivery, and the person for whom delivered, it is an every day practice almost, to show for whom the person ordering them was acting, if a question of agency arises. Story on Agency, § 50. * * * Affirmed.

DICKINSON v. SALMON.

(Supreme Court of New York, Appellate Term, 1901. 36 Misc. Rep. 169, 73 N. Y. Supp. 196.)

McADAM, J. The plaintiff, a plumber, did and performed work and furnished material in making repairs to the houses known as Nos. 57 and 59 West Seventy-First street and No. 132 West Eighty-Fifth street, in the city of New York, between January and March, 1896, of the value of $136.38. The order for the work and material was given by one Frank Yoran, and the main question litigated at the trial was whether Yoran had authority to give the order and bind the defendant thereby.

It was conceded that Yoran was the agent employed to collect the rents, and that, according to the custom of agents, he made out written statements every month to his principal, giving the amount of rents collected, the commissions for collection, and the repairs to the houses, and after deducting these a check was made out by Yoran, for the balance, to the individual name of the defendant, who deposited the same in his bank. For five years these statements and checks were sent to and received by the defendant, the checks being indorsed and deposited to his credit. He never at any time objected that the checks were not properly made out, or that Yoran had no authority to contract bills for repairs. This evidence was sufficient to require the submission of the question of agency and authority to the jury. It was so submitted, and the jury found that Yoran had the required authority, and rendered a verdict in favor of the plaintiff.

It is impossible to lay down any inflexible rule by which it can be determined what evidence is sufficient to establish agency in any given case, but it may be said, in general terms, that whatever evidence has a tendency to prove agency is admissible, even though it be not full and satisfactory, as it is the province of the jury to pass upon it. Mechem,

Ag. § 106. Authority is often implied from the recognition of the principal or his acquiescence in the acts of the agent (Story, Ag. §§ 54, 55; 2 Greenl. Ev. [Redf. Ed.] § 65; Cow. Treat. [Kingsley's Ed.] §§ 154, 242), as well as from circumstances (In re Zinke, 90 Hun, 127, 35 N. Y. Supp. 645). Thus, where one is accustomed to permit his wife, child, or servant to purchase goods on his account, all purchases so made will be deemed authorized, and he will be bound to pay for them. Cow. Treat. § 242. And see Olcott v. Tioga R. Co., 27 N. Y. 546, 84 Am. Dec. 298; Sykes v. Temple, 69 Hun, 448, 23 N. Y. Supp. 425; Lowenstein v. Lombard, Ayres & Co., 164 N. Y. 324, 58 N. E. 44; Wood, Mast. & S. § 260. The argument by which the defendant seeks to avoid the application of these rules is unavailing.

We find no errors prejudicial to the appellant, and the judgment and order must be affirmed, with costs. All concur.

SHARP v. KNOX.

(Kansas City Court of Appeals, Missouri, 1892. 48 Mo. App. 169.)

Suit in equity for cancellation of a certain deed of trust and the surrender of a certain promissory note secured thereby. The evidence consisted of an extensive correspondence between Craig and defendant as to this and other similar business transactions.

SMITH, P. J.[6] * * * The undisputed evidence is that on February 15, 1888, Craig loaned for Knox to plaintiff $750, taking a note therefor, payable to Knox on or before three years after date. Plaintiff executed a deed of trust on his land to secure the note. Craig told plaintiff at the time of the execution of the note that it could be paid at his office. The note and deed of trust were sent to Knox. On March 15, 1888, plaintiff through Craig secured another loan from another capitalist, by giving his note and deed of trust on his land for the same; out of this last-named loan he paid off to Craig the Knox note. Craig then told plaintiff that he would give him a receipt against the note and mortgage, which he accordingly did; he further then told plaintiff that he did not then have the note in his possession, but would send back to Knox and get it. The matter thus remained until Craig failed, when it was discovered that Knox still held plaintiff's note, and that the deed of trust had not been satisfied on the record.

The decisive question presented for our determination is that of agency, whether Craig was authorized to collect of the plaintiff the note given by him to Knox while it was in the latter's possession. The rule is elemental that agency is directly proven by express words of appointment, whether orally uttered or contained in some deed or other writing. It is directly established by evidence of the relative situation of the parties, or of their habits and course of dealing and inter-

[6] Part of the opinion is omitted.

course, or is decided from the nature of the employment or from subsequent ratification. Greenl. Ev. § 60. An agency may be created by the express words or acts of the principal, or it may be implied from his conduct and acquiescence; so the nature and extent of the authority of an agent may be implied or inferred from circumstances. If the agency arises by implication from numerous acts done by the agent with the tacit consent or acquiescence of the principal it is deemed limited to acts of like nature. Story on Agency, §§ 45, 97. It has been in effect repeatedly held in this state that agency and the scope of an agent's authority are facts to be proved like other facts. They may be proven by the transactions that have taken place between the principal and the agent, showing what the understanding was as to the scope of the agent's authority; evidence of a course of dealing by an agent sanctioned by his principal is one of the recognized modes of proving the extent of an agency; and such evidence is admissible whether the party introducing it knew at the time of the transaction in controversy, that the dealings had taken place or not. Gibson v. Zeibig, 24 Mo. App. 65; Greeley-Burnham Grocery Co. v. Capen, 23 Mo. App. 301; Wheeler v. Metropolitan Co., 23 Mo. App. 190; Brooks v. Jameson, 55 Mo. 505; Franklin v. Globe, 52 Mo. 461; Edwards v. Thomas, 66 Mo. 468. In the last-cited case it is said, "Instances there are without number to be found in books, when authority of an agent to act in a given manner follows by inevitable implication from the mere fact of his employment or from long-continued and repeated acts of acquiescence." In Mechem on Agency, § 86, it is stated: "That, where it appears the alleged agent has repeatedly performed acts like the one in question which the principal has ratified and adopted, his authority for the performance of the disputed act may be inferred. And this statement of the rule seems fairly supported by a number of adjudicated cases. Jewett v. Railroad, 10 Ind. 539; Fisher v. Campbell, 9 Port. 210; Robinson v. Green, 5 Har. 115; Rawson v. Curtiss, 19 Ill. 456; Emerson v. Cogswell, 16 Me. 77; Walsh v. Pierce, 12 Vt. 130; Downer v. Morrison, 2 Grat. 237. When the principal puts an agent forward as general agent, though in a particular line, or places him in a position where others are justified in the belief that his powers are general, the restriction that may be imposed upon him privately will be immaterial except between him and his principal. New Albany v. Meyers, 43 Mo. App. 124; Baker v. Railroad, 91 Mo. 152, 3 S. W. 486. And, when an agency is shown to exist, the presumption would be that the agent's authority was general rather than limited. Mechem on Agency, § 9.

It is conceded that Craig was the agent of Knox, but it is insisted that his powers as such agent were special and limited. As has already been stated Craig, as the agent of Knox, made repeated collections of the notes of the latter while the same were in his possession at his home in Indiana, and under precisely the same circumstances

that the note in question was collected, and which collections so made were satisfied and adopted by Knox. For the performance of the disputed act in this case we think, under the principles of law just adverted to, the authority of Craig may be inferred. The authority of Craig, as agent of Knox, to collect the note of plaintiff results by inevitable implication from the long-continued and repeated acts of acquiescence, to which reference has been made. We think the general authority of Craig to collect and otherwise manipulate the Missouri loans of Knox is fairly deducible from the facts shown by the evidence.[7] * * *

Judgment for plaintiff affirmed.

II. WRITTEN POWER

ELLIOTT v. STOCKS.[8]

(Supreme Court of Alabama, 1880. 67 Ala. 336.)

Suit commenced by attachment at the instance of Stocks and against Cothran, Marshall, McCullough and McElwain. Elliott claimed the property in question as trustee under a deed of trust by McElwain given in 1875 to secure large creditors of the Cornwall Iron Works. The Works had been in straits, and on January 1, 1874, was bid in at a sale by Cothran, with the consent of the creditors, under an agreement that he should operate for the benefit of the creditors and upon satisfying them he should have the Works.

[7] It is not necessary to establish every agency by direct evidence. It may be established by circumstances, such as the relation of the parties and their conduct with reference to the subject matter of the alleged contract. Lindquist v. Dickson, 98 Minn. 369, 107 N. W. 958, 6 L. R. A. (N. S.) 729, 8 Ann. Cas. 1024 (1906), ante, p. 758; Roberson v. Clevenger, 111 Mo. App. 622, 86 S. W. 512 (1905); Hull v. Jones, 69 Mo. 587 (1879); Tennessee River Transfer Co. v. Kavanaugh, 101 Ala. 1, 13 South. 283 (1893). Or by a long course of dealing by an agent for his principal in which acts in this line have never been repudiated by the principal. Wheeler v. Benton, 67 Minn. 293, 69 N. W. 927 (1897).

In the nature of the case greater latitude must be allowed in the admission of evidence to prove an implied agency than in the case of an express agency. Patterson v. Van Loon, 186 Pa. 367, 40 Atl. 495 (1898).

[8] Accord: Loudon Savings Fund Society v. Hagerstown Savings Bank, 36 Pa. 498, 78 Am. Dec. 390 (1860).

If the writing cannot be produced its contents must be clearly proved. Stadleman v. Fitzgerald, 14 Neb. 290, 15 N. W. 234 (1883).

See, also, Claflin v. Continental Jersey Works, 85 Ga. 27, 11 S. E. 721 (1890), ante, p. 337.

However, it is competent to prove by parol the situation of the parties and of the subject-matter of the agency at the time it is made, and the surrounding circumstances, not to contradict or enlarge the written power, but to explain it and its scope. Wood v. Clark, 121 Ill. 359, 12 N. E. 271 (1887); Brantley v. Southern Life Ins. Co., 53 Ala. 554 (1875). So, too, proof of the usages of trade may be permitted to interpret the powers actually given, though not to enlarge them. Cawthorn v. Lusk, 97 Ala. 674, 11 South. 731 (1892), ante, p. 310.

This agreement let in with Cothran the other defendants in the attachment suit. The debts were not paid, and Elliott and Stocks both claim the property.

STONE, J.[9] Many of the questions in this cause are settled by our rulings in the case of Elliott v. Stocks & Bro., at the present term (67 Ala. 290).

The instrument under seal of January 1st, 1874, is the written evidence of the contract by which the defendants agreed to operate the property known as the Cornwall Iron Works, in joint adventure. Before that agreement was consummated, the ownership of the property was in Cothran. That agreement let in Marshall, McCullough, and McElwain. Before reading it in evidence, it was necessary to prove its execution. It purported to be signed by Cothran and McCullough in person, with scrolls for seals annexed, and the signature for Marshall was as follows: "Robert Marshall, by his attorney in fact, Thomas McCullough. [Seal.]" McCullough was called to prove the execution, and he proved that both Cothran and himself executed it in person. He proved that he executed for Marshall, and that he had authority to do so. On cross-examination he was asked if his authority to execute for Marshall was not in writing. This question was objected to by plaintiffs, and the court sustained the objection. In this the Circuit Court erred. If the authority was in writing, it should have been produced, or its destruction shown, or some other excuse, sufficient in law, given, why it was not produced. And, in any event, it was the privilege and right of the claimant to cross-examine the witness as to the contents of the authority to sign, even if the absence of the writing was sufficiently accounted for. The contract offered in evidence was under seal, and authority to execute and seal it must have been in writing, to be valid. 1 Greenl. Ev. § 269. * * *

Reversed and remanded.

MT. MORRIS BANK v. GORHAM.

(Supreme Judicial Court of Massachusetts, 1897. 169 Mass. 519, 48 N. E. 341.)

Action by the Mt. Morris Bank against the firm of C. L. Gorham & Co. Verdict for defendants. Plaintiff excepts. Exceptions overruled.

HOLMES, J.[10] This is an action upon two bills purporting to be drawn upon the defendants by Haines & Co., payable to the order of the drawees, and to be accepted by the defendants, in the form, "C. L. Gorham & Co. p. p. a. Chas. A. Williams." Williams was an agent of the defendants, who had charge of their shop, but the defendants denied that he had any authority to sign drafts, and at the trial put in a written power of attorney which is admitted not to have

[9] Part of the opinion is omitted. [10] Part of the opinion is omitted.

authorized him to do it. Their evidence tended to prove that these drafts were issued by Williams in pursuance of a scheme between Haines and him by which a series of similar drafts had been issued, discounted, and their payment provided for, without the defendants ever having known anything about the matter. The defendants were regular purchasers of pianos from Haines & Co., but their case was that Williams was not authorized to pay for them otherwise than by check on the Central National Bank of Worcester. The plaintiff contended that Williams' authority had been enlarged beyond the written power of attorney, and that, whether this had been done or not, the defendants were chargeable with notice of Williams' course of dealing, on the ground that, at least, they ought to have known of it, and might have discovered it by reasonable care, and, therefore, that Williams had ostensible authority to sign as he did. The defendants had a verdict, and the case is here on exceptions. * * *

3. The next request with which we have to deal was that there was no evidence to charge the plaintiff with notice of any irregularity or want of authority in the issuing of the drafts. The signature "p. p. a." probably meant, and certainly might have been found to mean, "per power attorney." If this was the meaning, not only was this request rightly refused, but the question of ostensible authority heretofore dealt with was at an end. The letters were notice to the plaintiff on the face of the bill that his agent depended for his authority to sign upon a written document, and the plaintiff took its chances if it did not call for the production of the power. Alexander v. Mackenzie, 6 C. B. 766; Attwood v. Munnings, 7 Barn. & C. 278. See Stainback v. Bank, 11 Grat. 269; Stainback v. Read, Id. 281, 286. It was sufficiently favorable to the plaintiff that the judge did not instruct the jury, as matter of law.

4. In this connection we may as well dispose of the exception to the admission of the power of attorney. The reference on the face of the bill would be enough to justify it without more. But, in general, of course a man who is sued upon a contract made in his name is not precluded from showing the limits of the powers expressly conferred by him, merely because the plaintiff has a right and may attempt to show that the powers were enlarged by the defendant's subsequent conduct.[11] The statement by the judge that, if the instrument was given, it was the sole measure of Williams' authority, plainly referred only to the moment when the instrument was given. The jury were allowed to find that his authority had been enlarged afterwards by the defendants' conduct. It is suggested for the plain-

[11] Authority very often is both written and verbal, and in such case oral proof may be given of the later enlargements and alterations of the written power. Bank of North America v. Embury, 21 How. Prac. 14 (1861).

See, also, Whitfield v. Brand, 16 M. & W. 282 (1847), in which it is said by Pollock, C. B., that where there is a written power the fact of agency may be proved by parol, but not the terms of the power.

tiff that it did not appear that Williams had any knowledge of the document, but only that it was deposited with the bank on which he was authorized to draw checks. It is enough to say that we think that the suggestion is not fairly open on the exceptions which assume the power to have been effective as between the parties to it. * * *

Exceptions overruled.

III. Declarations, Acts and Testimony of the Agent

GAMBILL v. FUQUA.

(Supreme Court of Alabama, 1906. 148 Ala. 448, 42 South. 735.)

Action for malicious prosecution and false imprisonment. There was verdict and judgment for plaintiff for $745, and, after motion for new trial had been overruled, the defendant prosecuted this appeal.

Anderson, J.[12] The plaintiff recovered damages of the defendant for his arrest and imprisonment without a warrant, made by one Boggan, a deputy of the defendant, who was license inspector of the city of Birmingham. * * *

There is no proof that the arrest was made by the authority of the defendant, unless the authority might be inferred from the declaration of Boggan at the time of the arrest: "Gambill told me that you and two or three others were the leaders in the Milkmen's Association, and that if I could make you pay license the balance would pay." If this could be considered as a declaration that the defendant had authorized the arrest, it was not competent for that purpose. "The authority of an agent, where the question of its existence is directly involved, can only be established by tracing it to its source in some word or act of the alleged principal. The agent certainly cannot confer authority upon himself. Evidence of his own statements or admissions, therefore, is not admissible against his principal for the purpose of establishing, enlarging, or renewing his authority; nor can his authority be established by showing that he acted as agent or that he claimed to have the powers which he assumed to exercise." Mechem on Agency, § 100; Galbreath v. Cole, 61 Ala. 140; Wharton on Evidence, § 1184; Scarborough v. Reynolds, 12 Ala. 252; Postal Co. v. Lenoir, 107 Ala. 640, 18 South. 266; L. & N. R. R. Co. v. Hill, 115 Ala. 334, 22 South. 163. Any declarations of the agent as to his authority were inadmissible, unless other evidence had been shown from which authority to do the thing may be inferred.[13] Or, if the trial court improperly admitted declarations of the agent, the error would be cured by evidence subsequently

[12] Part of the opinion is omitted.

[13] Accord: Fairlie v. Hastings, 10 Ves. Jr. 123 (1803), a leading case in England.

It does not alter the rule that the statements are made dum fervet

introduced from which authority might be inferred; and, in case such evidence was introduced the question of authority would become one of fact for the determination of the jury. Birmingham R. R. Co. v. Tenn. Co., 127 Ala. 137, 28 South. 679.

The only evidence, aside from the declaration of Boggan, as to the agency, was that he was the defendant's deputy, and had served in that capacity for some time. It is true that if an agent, while acting within the scope of his authority, exceeds his authority, the principal would be liable; but there is nothing to indicate, from the evidence in the case at bar, that Boggan was acting within the scope of his authority in making the arrest, or that he was doing a thing which his principal had authorized him to do. No authority to make arrests without warrants could be implied from the fact that he was defendant's deputy license inspector, and there is no evidence that defendant authorized the arrest. Indeed, there is nothing in the evidence that would indicate that the defendant had authority to arrest people for violating the ordinance. An agent has no implied power to do that which the master himself, being present, would not be authorized to do. Mali v. Lord, 39 N. Y. 381, 100 Am. Dec. 448; Whitmore v. Allen, 33 Tex. 355; 12 Am. & Eng. Ency. Law, 775.

Where a principal is sued for an unlawful arrest and imprisonment made or caused by an alleged agent, and there is no evidence of prior authority or subsequent ratification, it is error to leave it to the jury to say whether or not there was such authority or ratification. National Bank v. Baker, 77 Md. 463, 26 Atl. 867. But, where there is any evidence tending to show the assent of the principal to the acts of the agent, these acts and declarations of the agent, in connection with such evidence of the principal's assent thereto, should be allowed to go to the jury. Gimon v. Terrell, 38 Ala. 208; McClung's Ex'rs v. Spotswood, 19 Ala. 165.

The acts of the defendant, the day of the trial, in asking the judge to let him send for Attorney Thach, his conference with him, and the subsequent dismissal of the prosecution, were facts to go to the jury as affording an inference, not only of a subsequent ratification, but of a precedent authorization. In the case of Shattuck v. Bill, 142 Mass. 61, 7 N. E. 40, it is held: "The plaintiff after his arrest, gave notice of his intention to take the oath for the relief of poor debtors; and evidence was offered of the presence and conduct of the defendant at these hearings, as tending to prove authority from him to make the affidavit and cause the arrest on his behalf. To the ad-

opus. Massillon Engine Co. v. Akeman, 110 Ga. 570, 35 S. E. 635 (1900); Brittain v. Westall, 137 N. C. 30, 49 S. E. 54 (1904).

The admission or claim of a person pretending to act as agent does not even tend to prove the agency and should be excluded. McCune v. Badger, 126 Wis. 186, 105 N. W. 667 (1905). His unsworn statements at their very best are mere hearsay. Gifford v. Landrine, 37 N. J. Eq. 127 (1883). To be received they must be made with the sanctity of an oath. Fitzgerald v. Kimball Bros. Co., 76 Neb. 236, 107 N. W. 227 (1906). If one chooses to take the

mission of this evidence the defendant has no ground of exception. If the whole proceeding in relation to the arrest was without authority from defendant, it is not reasonable to suppose that he would take part in opposition to the application by the plaintiff to relieve himself therefrom; and his acts in relation thereto, although occurring after the arrest, had a tendency to show that it was initiated by his authority almost as directly as if he had thus expressly asserted it." The evidence, therefore, of the subsequent conduct of the defendant at the trial, cured any error that may have been previously committed as to the acts and statements of Boggan. * * *

Judgment affirmed.

WALSH v. ST. PAUL TRUST CO.

(Supreme Court of Minnesota, 1888. 39 Minn. 23, 38 N. W. 631.)

PER CURIAM. The appellant's claim against the estate is founded upon a contract alleged to have been made by him with the deceased verbally. The making of any contract was put in issue, and upon the trial the appellant failed to prove it, so as to entitle him to recover upon it. From the offer of proof, by the testimony of Mr. Kerr, and from the admission made in respect to the proposed testimony, it only appears that Mr. Kerr was familiar with the contract, had heard it stated by the parties, and knew exactly what it was. There was no offer and no proof as to what that contract was,—what were its terms and conditions. The offer to show that Mr. Warner was "acting for the administrator" of the estate at the time when certain papers belonging to the estate were delivered to him was not equivalent to showing that he had any authority to so act, or to contract in behalf of the estate. This is a sufficient reason, without considering others, why the proposed testimony of Mr. Warner, relating to such papers, could not affect this case.[14] Judgment affirmed.

statements of the agent as to his authority, he does so at his own risk. Kornemann v. Monaghan, 24 Mich. 36 (1871). The agent cannot invest himself with authority. Grover & Baker Sewing Machine Co. v. Polhemus, 34 Mich. 247 (1876); Eaton v. Granite State Provident Ass'n, 89 Me. 58, 35 Atl. 1015 (1896); Jones v. Harrell, 110 Ga. 373, 35 S. E. 690 (1900).

While it is more regular to first prove the agency by evidence aliunde, and then admit the agent's statements, still this rule is not invariable. The order in which proof shall be submitted rests largely in the discretion of the Court. Woodbury v. Larned, 5 Minn. 339 (Gil. 271) (1861). If, however, the statements of the agent are first admitted they must later be ruled incompetent, if they are not by other evidence connected with the principal. Snook v. Lord, 56 N. Y. 605 (1874). If agency is proved by other evidence, the statements of course are competent. Jackson v. American Telephone & Telegraph Co., 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738 (1905). However to admit proof of an agent's declarations before laying a foundation for it by other evidence of his agency is not commendable, and is liable, even when properly restricted by the Court, to prejudice the jury. Campbell v. Sherman, 49 Mich. 534, 14 N. W. 484 (1883).

[14] Neither the acts nor the words of an agent can be shown to prove the agency. Hutchinson Wholesale Grocery Co. v. McDonald & Co., 71 Kan. 861,

FOWLDS v. EVANS et al.

(Supreme Court of Minnesota, 1893. 52 Minn. 551, 54 N. W. 743.)

Evans contracted to construct ninety miles of railway and sublet portions to Fowlds. The latter, having $54,000 still unpaid, brings an action to foreclose his statutory lien. One Wilson had for some time assumed to act as Evans' agent in dealing with plaintiff. Judgment for defendant.

COLLINS, J.[15] * * * But a new trial must be had, as the court erred in some of its rulings when excluding certain testimony, and again in striking out portions of that already in, which was proper and competent as tending to show that Wilson was Evans' agent. We need not refer to these erroneous rulings specifically, but will call attention to well-recognized rules of evidence in like cases, under which a part of the testimony excluded, and some, at least, of that stricken out, should have been received or retained. We have stated the general course of Wilson's conduct, and what he did at Sauk Center for a period of three or four months, while plaintiff and other subcontractors under Evans were at work on the line. That he pretended to act for Evans, and that on one occasion at least, and in a matter of fact way, Evans recognized him as his representative, is certain. That Evans paid him occasional visits, and once took him over a part of the work with him, and that he was recognized by the officers of the road and by the subcontractors as Evans' agent, was well established; and that his course of conduct must have been known by the latter seems beyond serious question. From the natural improbabilities that without authority he would assume to act in the capacity that he did during nearly all of the time the work was being done, and from the fact that such conduct would naturally come to be known by the assumed principal, the fact of agency may be presumed. Neibles v. Railway Co., 37 Minn. 151, 33 N. W. 332. It was well said in Reynolds v. Collins, 78 Ala. 94, that "as a general rule the fact of agency cannot be established by proof of the acts of the professed agent in the absence of evidence tending to show the principal's knowledge of such acts, or assent to them; yet when the acts are of such a character and so continued as to justify a reasonable inference that the principal had knowledge of them, and would not have permitted them if unauthorized, the acts themselves are competent evidence of agency."

In view of these rules it is obvious that the court erred in many of

80 Pac. 950 (1905). See, also, Schlitz Brewing Co. v. Barlow, 107 Iowa, 252, 77 N. W. 1031 (1899), in which a newspaper advertisement of an agency by the agent was held inadmissible to prove the agency.

If there is any other evidence of the agency, then the act of the alleged agent cannot be excluded from the jury, for they are judges of the weight and sufficiency of the testimony. S. & N. Ala. R. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578 (1875).

[15] Part of the opinion is omitted.

its rulings, particularly when it struck out the testimony of plaintiff as to Wilson's trips over the line of work, giving instructions to the subcontractors in respect to the manner of the performance of their contracts, and directing them to increase their forces, as Evans' superintendent of construction. These acts and the surrounding circumstances had a strong tendency to establish knowledge in Evans of Wilson's pretended agency, and, even if it was nothing but pretense, to conclude him from asserting to the contrary. With Wilson's acts in connection with the work, Evans' association with him when in the state, and the relation between these two persons and the officers of the road while the work was progressing, and what transpired afterwards, one would have to be quite skeptical in order to believe that Wilson was not what he assumed to be.[16] * * *

Judgment reversed.

WALES v. MOWER.

(Supreme Court of Colorado, 1908. 44 Colo. 146, 96 Pac. 971.)

Action by Maggie Mower against L. M. Wales and D. S. Baldwin to restrain the sale of real estate under a trust deed, upon the ground that the note secured by the trust deed had been paid. It appeared that payment had been made to Baldwin who negotiated the loans, but his authority to receive it was denied. He testified that he had authority. From a judgment for plaintiff defendant appeals.

MAXWELL, J.[17] * * * Objection was made to the introduction of Baldwin's testimony as to his instructions from appellant in regard to loaning and reloaning the money, the reception of the exhibits referred to, and certain cross-interrogatories attached to the deposition, all of which objections were overruled, and error is assigned upon these rulings.

The argument in support of these assignments of error is based upon the rule that "it is well settled that neither the fact of agency nor the extent of authority can be proved by the declarations of the alleged agent." In support of this contention R. E. Lee S. M. Co. v. Englebach, 18 Colo. 106, 31 Pac. 771, Extension G. M. & M. Co. v. Skinner, 28 Colo. 237, 239, 64 Pac. 198, and Burson v. Bogart, 18 Colo. App. 449, 72 Pac. 605, are cited. In the Englebach Case it was said: "It is well settled that neither the fact of agency nor the extent of authority can be proved by the declarations of the alleged agent. And it is equally as well established that, when an agent makes a contract

[16] But evidence of a general reputation as agent, not known and acquiesced in by the principal, cannot be put in as proof of the existence of the agency. Thompson v. Laboringman's Mercantile, etc., Co., 60 W. Va. 42, 53 S. E. 908, 6 L. R. A. (N. S.) 311 (1906), ante, p. 105. Evidence of such a reputation is irrelevant and should be excluded. Union Trust Co. v. McKeon, 76 Conn. 508, 57 Atl. 109 (1904).

[17] Part of the opinion is omitted.

or does any act representing his principal, his declarations made at the time explanatory of the act are admissible in evidence on behalf of either party. * * * It is true that as a general rule such declarations ought not to be received until proof has been made of the agency. But the order in which evidence may be introduced is almost entirely within the discretion of the trial court." In all of the cases cited the testimony of the alleged agent was not introduced. Here the alleged agent testified. The rule invoked does not exclude testimony of an alleged agent as to the fact of agency.

In Fisher v. Denver Nat. Bank, 22 Colo. 373, 382, 45 Pac. 440, it is held that the alleged agent himself may testify as to the agency.

In Nyhart v. Pennington, 20 Mont. 158, 50 Pac. 414, objection was made to the testimony of an alleged agent on the ground here urged. The court said: "Appellants invoke a generally correct rule of law, but an inapplicable one. Plaintiffs were not trying to prove agency by the declarations of the agent, but by his sworn testimony to the fact. This they could do. The rule is that the declarations of an agent are not competent to establish the fact of his agency. But the declarations of the agent are very different from his testimony to prove the fact of his agency."

In O'Leary v. German-American Ins. Co., 100 Iowa, 390, 69 N. W. 686, it was held that the rule that the authority of an agent cannot be sustained by his own declarations does not render it impossible to prove the authority of an agent by his own testimony.

In Howe Machine Co. v. Clark, 15 Kan. 494, Mr. Justice Valentine, writing the opinion of the court, said: "It is competent to prove a parol agency, and its nature and scope, by the testimony of the person who claims to be the agent. It is competent to prove a parol authority of any person to act for another, and generally to prove any parol authority of any kind, by the testimony of the person who claims to possess such authority. But it is not competent to prove the supposed authority of an agent, for the purpose of binding his principal, by proving what the supposed agent has said at some previous time. Nor is it competent to prove a supposed authority of any kind, as against the person from whom such authority is claimed to have been received, by proving the previous statements of the person who, it is claimed, had attained such authority."

No authority has been cited contrary to the doctrine above announced. The authorities cited are inapplicable to the case at bar, for the reason that they apply to declarations made by the agent to another, who is introduced as a witness to testify to such declarations, and not to the direct testimony of the agent himself. All authorities hold that the agent is competent to testify to the agency.[18] The testi-

[18] Accord: Phillips v. Poulter, 111 Ill. App. 330 (1903). The agent as a witness is under oath, and subject to cross-examination. Schlitz Brewing Co. v. Grimmon, 28 Nev. 235, 81 Pac. 43 (1905). But he must state facts and circumstances, and not his opinion, or conclusion, as to his agency. McCormick

mony of Baldwin having been properly admitted, the exhibits and answers to the cross-interrogatories were admissible, as tending to corroborate the testimony of Baldwin, and as explanatory of the manner in which the business was transacted by the parties. No error was committed by the court in admitting the evidence objected to. * * *

Affirmed.

GARTH v. HOWARD.

(Court of Common Pleas, 1832. 8 Bing. 451, 21 E. C. L. 616.)

Detinue for plate. Plea, general issue. At the trial before Tindal, C. J., it appeared that Howard had, without authority, pawned, for £200., certain plate belonging to the plaintiff. The defendant, Fleming, was a pawnbroker; but the only evidence to show that the plate had ever been in his possession, was a witness, who stated that, at the house of the plaintiff's attorney, he heard Fleming's shopman say that it was a hard case, for his master had advanced all the money on the plate at 5 per cent.

This evidence being objected to, was received, subject to a motion to this Court; and a verdict having been given for the plaintiff, defendant obtained a rule nisi to show cause.

TINDAL, C. J. The rule in this case has been obtained upon two distinct grounds; but it is unnecessary to give an opinion upon any other than this, namely, whether the declaration of the shopman of the defendant Fleming, that the goods were in the possession of his master, was admissible: for it is clear that, unless Fleming is to be affected by such declaration, he is entitled to the verdict upon the general issue, non detinet. If the transaction out of which this suit arises had been one in the ordinary trade or business of the defendant as a pawnbroker, in which trade the shopman was agent or servant to the defendant, a declaration of such agent that his master had received the goods, might probably have been evidence against the master, as it might be held within the scope of such agent's authority to give an answer to such an inquiry made by any person interested in the goods deposited with the pawnbroker. In that case, the rule laid down by the Master of the Rolls in the case of Fairlie v. Hastings, 10 Ves. 128, which may be regarded as the leading case on this head of evidence, directly applies. But the transaction with Fleming appears to us, not a transaction in his business as a pawnbroker, but was a loan by him as by any other lender of money at 5 per cent. And there is no evidence to show the agency of the shopman in private transactions unconnected with the business of the shop. I

v. Queen of Sheba Gold Mining & Mill. Co., 23 Utah, 71, 63 Pac. 820 (1895); Blowers v. Southern Ry. Co., 74 S. C. 221, 54 S. E. 368 (1906), ante, p. 488. The agent's testimony is of course not conclusive. Howard v. Braithwaite, 1 Ves. & B. 202 (1812).

doubted much at the time whether it could be received, and intimated such doubt by reserving the point; and now, upon consideration with the Court, am satisfied that it is not admissible. It is dangerous to open the door to declarations of agents, beyond what the cases have already done. The declaration itself is evidence against the principal, not given upon oath: it is made in his absence, when he has no opportunity to set it aside, if incorrectly made, by any observation, or any question put to the agent; and it is brought before the Court and jury frequently after a long interval of time. It is liable, therefore, to suspicion originally, from carelessness or misapprehension in the original hearer; and again to further suspicion, from the faithlessness of memory in the reporter and the facility with which he may give an untrue account. Evidence, therefore, of such a nature, ought always to be kept within the strictest limits to which the cases have confined it; and as that which was admitted in this case appears to us to exceed those limits, we think there ought to be a new trial.

Rule absolute.

EAGLE IRON CO. v. BAUGH.

(Supreme Court of Alabama, 1906. 147 Ala. 613, 41 South. 663.)

Action by Baugh against the Iron Company for failure to take 500 cords of wood, which it was alleged plaintiff had sold appellant through its agent, one Stewart. The disputed question was whether Stewart was an agent with such authority.

ANDERSON, J.[19] "The authority of an agent, where the question of its existence is directly involved, can only be established by tracing it to its source in some word or act of the alleged principal. The agent cannot confer authority upon himself. Evidence of his own statements or admissions, therefore, is not admissible against his principal for the purpose of establishing, enlarging, or renewing his authority; nor can his authority be established by showing that he acted as agent or that he claimed to have the powers which he assumed to exercise." Mechem on Agency, § 100; Galbreath v. Cole, 61 Ala. 140; Wharton on Evidence, § 1184; Scarborough v. Reynolds, 12 Ala. 252; Postal Co. v. Lenoir, 107 Ala. 640, 18 South. 266; L. & N. R. R. Co. v. Hill, 115 Ala. 334, 22 South. 163. Any declaration of the agent as to his authority would be admissible, when other evidence had been shown from which authority to do the thing may be inferred; or, if the trial court improperly admitted declarations of the agent, the error would be cured by evidence subsequently introduced from which authority might be inferred, and in case such evidence was introduced the question of authority would be-

[19] Part of the opinion is omitted.

come one of fact for the determination of the jury.[20] Birmingham R. R. Co. v. Tenn. Co., 127 Ala. 137, 28 South. 679.

There was evidence from which the jury could infer that McClane, the superintendent, had authority to contract for and buy wood for the defendant, and to delegate the authority to others, and that Stewart was its agent, independent of the acts and declarations of McClane and Stewart. There was evidence from which it could be inferred that these men were held out as agents with authority to buy wood, and also of a ratification by the defendant of their acts. * * * For error on another point reversed and remanded.

MOYLE v. CONGREGATIONAL SOC. OF SALT LAKE CITY.

(Supreme Court of Utah, 1897. 16 Utah, 69, 50 Pac. 806.)

Action for work done and materials furnished in the construction of defendant's church. The contract was made with Barber & Co. and later by agreement assigned to plaintiff's assignor. The church had paid the full contract price, but plaintiff claimed that at the time of the assignment of the contract the chairman of the building committee, one Hollister, as agent for defendant, agreed that the contract price should be waived, and defendant should pay whatever it cost to do the work. Hollister had since died. Judgment for plaintiff and defendant appeals.

MINER, J.[21] * * * The court, over the objection and exception of the defendant, permitted Mr. James and Mr. Pringle, witnesses for the plaintiff, to testify that in a conversation with Mr. Hollister some time after the assignment of the Barber contract, and after Barber had left town, Mr. Hollister said that he had got rid of Barber, but it cost him $500 to get him away; that witness James asked Hollister, out of mere curiosity—as it did not affect witness' contract with Hollister—how he got rid of the contractor, and how he settled up with him; that Hollister replied, "We bought him off for $500, and I would have given him $1,000 to get rid of him, if I had to." The objection to the testimony was that it was incompetent and irrelevant, simply calling for a recital of past events, and does not bind the defendant.

The admission of this testimony was erroneous. The transaction did not concern the witness, and the declaration was made with reference to a past transaction, and long after the act referred to, and was no part of the res gestæ. Where the act of the agent will bind the

[20] When there is other evidence of the agency, the statements of the agent may be received to show that he purported to act for the principal, and not for some one else. Nowell v. Chipman, 170 Mass. 340, 49 N. E. 631 (1898). If the agency is admitted, then the statements and acts may all be considered as part of the case. Bacon v. Johnson, 56 Mich. 182, 22 N. W. 276 (1885).

[21] Other portions of this case are found on pp. 104, 342.

principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time, and constituting part of the res gestæ. "But an act done by an agent cannot be varied, qualified, or explained by his declarations, which amount to no more than a mere narration of past occurrences, or by an isolated conversation held, or an isolated act done, at a later period. The reason is that the agent to do the act is not authorized to narrate what he had done, or how he had done it, and his declaration is no part of the res gestæ." Railroad Co. v. O'Brien, 119 U. S. 99, 7 Sup. Ct. 118, 30 L. Ed. 299; Story, Ag. § 134. Mechem, in his work on Agency (section 714), states the general rule to be: "The statements, representations, or admissions must have been made by the agent at the time of the transaction, and either while he was actually engaged in the performance, or so soon after as to be in reality a part of the transaction; or, to use the common expression, they must have been a part of the res gestæ. If, on the other hand, they were made before the performance was undertaken, or after it was completed, or while the agent was not engaged in the performance, or after his authority had expired, they are not admissible. In such a case they amount to no more than a mere narrative of a past transaction, and do not bind the principal. The reason is that, while the agent was authorized to act or speak at the time and within the scope of his authority, he is not authorized, at a subsequent time, to narrate what he had done, or how he had done it."[22] 1 Greenl. Ev. § 113; Bank v. Clark, 139 N. Y. 307, 34 N. E. 908, 36 Am. St. Rep. 705; Browning v. Hinkle, 48 Minn. 544, 51 N. W. 605, 31 Am. St. Rep. 691; Polleys v. Insurance Co., 14 Me. 141.

Under this general rule, it is not required that a perfect coincidence of time between the declaration and the main facts be shown. It is sufficient if the declaration and the main facts are substantially contemporaneous. The declaration, however, must be voluntary and spontaneous, and so proximate in point of time as to grow out of, elucidate, and explain the character and quality of the main fact, and must be so clearly connected with it as virtually to constitute but one entire transaction, and to preclude the idea of design, afterthought, or a mere narrative of a past transaction. Mechem, Ag. § 715; Railroad Co. v. O'Brien, 119 U. S. 99, 7 Sup. Ct. 118, 30 L. Ed. 299. From the general trend of the testimony, it appears that this conversation did not occur until several days after the assignment, and the payment of the $500 by the church to Barber & Co., and after Barber had left the city. We are of the opinion that the court erred in admitting the testimony.

There are many exceptions taken to the admission and rejection

[22] If the principal employs agents to talk for him, he will be responsible for what they say, but the mere fact that he employs them to work for him does not make him chargeable with what they say about him, or his affairs. Standard Oil Co. v. Linol Co., 75 N. J. Law, 294, 68 Atl. 174 (1907) ante, p. 771.

of testimony in the case, but, as those already passed upon are decisive of the case, we do not consider it necessary to refer to the remaining exceptions. For the errors referred to the judgment of the district court is reversed and set aside, and the case remanded, with directions to grant a new trial.[23]

PEYTON v. OLD WOOLEN MILLS CO.

(Court of Appeals of Kentucky, 1906. 122 Ky. 361, 91 S. W. 719, 28 Ky. Law Rep. 1303.)

O'REAR, J.[24] Appellant, who is a married woman, had been engaged in the mercantile business at Oscar, Ky., prior to 1900. In the latter year the store building and stock of merchandise were destroyed by fire. The house was rebuilt directly, and within a few months a new stock of general merchandise was bought, and a merchandising business conducted at that stand, of the same nature and in the same name as before. Mrs. Peyton's name in her business was generally used simply as "F. L. Peyton." Her husband had previously conducted the business for her. She personally had but little to do with it. After the fire in 1900 and when the new business was begun, the style of the concern was "F. L. Peyton." Her husband's name was Frank Peyton. He claims it was Frank L. Peyton. Perhaps it was. But it seems that ordinarily he omitted the "L." in the signature of his own name. Mrs. Peyton owned a farm, some houses in Oscar, and other property. She was solvent. Her husband was then and is yet insolvent and without credit. An interest in the store was sold to one Webb, and the style of the firm changed to Peyton, Webb & Co. The stock of merchandise owned by this concern was also destroyed by fire. Suits were brought by creditors of the firm, wholesale merchants who had sold it the stock of merchandise, against appellant, Mrs. Frances L. Peyton, to charge her as a partner upon the firm's indebtedness. She denied that she was or ever had been a member of the firm. The new business was conducted by Frank Peyton just as had been done, so far as his personal management went, when Mrs. Peyton owned it. The sole issue made by the pleadings was whether appellant was a member of the firm of Peyton, Webb & Co. * * *

There was considerable evidence introduced by appellees that Frank Peyton, not in the presence of his wife, represented that she, and not he, was the member of the firm of the name of "F. L. Peyton." It was also shown that in giving in the property to the county assessor for taxation, he listed all the property, her lands and the stock of merchandise, in the name of "F. L. Peyton," that in making

[23] The concurring opinion of Zane, C. J., is omitted.

[24] Part of the opinion is omitted.

reports to the R. G. Dunn mercantile agency he showed that it was Mrs. Peyton who was the member of the firm. All of this evidence was introduced as substantive evidence in support of appellee's contention that appellant, Mrs. Peyton, was in fact the F. L. Peyton who conducted and was a member of the firm who conducted that business. This class of evidence was objected to by appellant, and was admitted over her exceptions. It was so extensive in volume, and so damaging in character and probable effect, that there is no doubt of its being reversible error, if error at all.

Appellees' contention is that, as appellant put her husband in the position and held him out as her agent, she is bound by his acts and statements made in that business, as if done and made by her in person. It is undeniably true that where one acts in a matter by an agent, the latter's action in the matter, if within the real or apparent scope of his agency, is as binding on the principal as if done by the principal himself. But it is always necessary to first establish the fact of the agency, and to show the actual or apparent scope of the agent's authority. This cannot be done by proving what the agent said or represented as to the extent of his authority. Morgan's Heirs v. Marshall, 7 J. J. Marsh. 316; Bruen v. Grahn, 5 Ky. Law Rep. 312; Dieckman v. Weirich, 73 S. W. 1119, 24 Ky. Law Rep. 2340; Cent. Penn. Tel. Co. v. Thompson, 112 Pa. 131, 3 Atl. 439; Francis v. Edwards, 77 N. C. 271; Galbreath v. Cole, 61 Ala. 139; Mussey v. Beecher, 3 Cush. 517.

It must be rare that what one claiming to be the agent of another said out of court of the nature and extent of his agency can be admitted as evidence of such agency against the principal. The whole doctrine of an agent's admission against the principal's interest binding the latter rests upon the idea that it is of the res gestæ, the representation or statement of the agent, in such cases, being the ultimate fact to be proved, and not the admission of some other fact. A party's own admissions against his interest may be given in evidence against him whenever made. But the admission or declaration of his agent binds him only when made during the continuance of the agency and in regard to a transaction then in hand and being executed. Greenleaf on Evidence, § 113. When the principal fact to be established is the liability (but not its extent) of one as principal in a transaction, what another, though his agent, may have said by way of admission concerning such principal's liability is hearsay; is not part of the res gestæ, and could not well be within the scope of an agent's authority to make. 1 Phil. on Evidence (Am. Ed.) 402.

The agent, of course, may as a witness testify to the fact and scope of his agency, unless otherwise incompetent as a witness. So, his agency may be shown by circumstances, as by proof of the conduct of the principal, acquiescence, approval and the like of the agent's acts. Such evidence goes to establish that the alleged principal is principal, as well as to show the scope of the agency. The question

being discussed is not whether an agent's statement in the course of a transaction, and concerning it, is receivable as evidence against the principal, but whether such a statement is receivable at all to prove the fact of the agency, which is to connect the principal with the matter. It is stated in Evans on Principal and Agent, p. 187: "As a general proposition, what one man says, not upon oath, cannot be evidence against another man. The exception must arise out of some peculiarity of situation, coupled with the declarations made by one. An agent may undoubtedly, within the scope of his authority, bind his principal by his agreement, and in many cases by his acts. What the agent has said may be what constitutes the agreement of the principal; or the representations or statements made may be the foundation of the inducement to the agreement. Therefore, if writing is not necessary by law, evidence must be admitted to prove that the agent made a certain statement. So, with regard to acts done, the words with which these acts are accompanied frequently tend to determine their quality. Nevertheless, the admission of the agent cannot be assimilated to the admission of the principal. A party is bound by his own admission, and is not permitted to contradict it; but it is impossible to say a man is precluded from questioning or contradicting anything any person has asserted as to him, as to his conduct, or his agreement, merely because that person has been an agent of his. An agent can act only within the scope of his authority; hence, declarations or admissions made by him as to a particular fact are not admissible as evidence against the principal, unless they fall within the nature of the agent's employment as agent; unless, for instance, they form part of the contract which he has entered into and is employed to negotiate on behalf of the principal. Hence, what is said by an agent respecting a contract or other matter in the course of his employment is good evidence to affect the principal, but not if it is said on another occasion."

In the case at bar the objectionable evidence was not admissions made by Frank Peyton as the agent of his wife, in the course of his agency, concerning the particular transactions in suit; i. e., the purchase of any of the bills of goods sued for. That Frank Peyton purchased the goods is not denied. Nor is there any issue as to the terms of the contracts. If there were, and if Frank Peyton's agency were established, directly or circumstantially, what he said in the course of the transactions respecting their terms would be receivable as evidence against his principal. But no such inquiry is involved here. On the contrary, it is, simply, for whom was Frank Peyton acting in making the purchases? What he said in the absence of appellant, and of which she was ignorant, cannot be evidence against her under any rule of evidence that he was acting for her. Although it may be assumed as otherwise proved that Frank Peyton was the general agent of his wife in conducting that mer-

cantile business, yet what he said in her absence respecting the fact that she was principal and he her agent only cannot be received as evidence that she was principal. Such statement is not properly a part of any transaction involved in the issue being tried, and therefore was not part of the res gestæ. What Frank Peyton did toward managing appellant's property, such as listing it for taxation in her name, is, when shown to have occurred as in this case, under circumstances presumably within her knowledge—for she must have known that, as she did not attend to that duty, some one did it for her—was relevant to show that the property was hers; not because Frank Peyton said it was, but because by her adoption of his act she also asserted it was hers. That he kept the bank account in her name, a fact shown to have been known to her, was also relevant upon the same principle. But what he said to merchants and reported to the mercantile agency were not relevant as against her, and it was error to have admitted that character of evidence to the jury. * * *

For the reasons indicated, the judgment is reversed, and cause remanded for a new trial under proceedings not inconsistent herewith.

SECTION 3.—WEIGHT AND SUFFICIENCY

STILL v. BOWERS.

(District Court of Philadelphia, 1864. 5 Phila. 363.)

HARE, J. Although the evidence given in this case to show that Kelty, who ordered the work for which the plaintiff sues, was the duly authorized agent of both the defendants, as he undoubtedly was of one of them, may have been but slight, it was still evidence which could not be withheld from the jury, and which was accordingly left to them with a caution against giving it too much importance, and an explanation of its true weight and bearing. They found for the plaintiff, and we see no sufficient reason for setting aside the verdict. The joint ownership of the mill; the concurrence of both the defendants in removing the old fixtures; the frequent visits of Bowers after the new machinery had been put up and was running under the personal superintendence of Conrow; the testimony of one of the workmen that when he applied to Conrow for employment, Bowers was sent for, and joined in referring the witness to Kelty, by whom he was engaged and paid in the name of Conrow and Bowers, were all circumstances which, although of comparatively little significance separately, are, when taken together, enough to show that the finding of the jury cannot be justly impugned, either as being without evidence, or contrary to its weight.

TEBBETTS v. LEVY.[25]

(City Court of New York, General Term, 1890. 11 N. Y. Supp. 684, 34 N. Y. St. Rep. 58.)

Action on a guaranty of payment for goods to the amount of $379. Defendant's name, as guarantor, was signed by his wife. The trial judge dismissed the complaint for want of evidence of authority in the wife.

PER CURIAM. On appeal from this judgment dismissing their complaint, the plaintiffs are entitled to have all their evidence taken as true, and to be given the benefit of the most favorable inferences deducible therefrom. Weil v. Railroad Co., 119 N. Y. 152, 23 N. E. 487. Although the statute requires the guaranty to be in writing, it was not necessary that Mrs. Levy's authority to execute it, as defendant's agent, should also be in writing. Parol authority is sufficient, and it may be proved by oral testimony. Worrall v. Munn, 5 N. Y. 229, 55 Am. Dec. 330; Dykers v. Townsend, 24 N. Y. 57; Bank v. Ballou, 49 N. Y. 155.

The defendant told the plaintiffs that his wife would have charge of his business; that they could do business with her as they had with him; and that they could let her have whatever she wanted, and it would be all right. On the defendant's return from Europe, plaintiffs demanded payment from him, and he said if his wife would tell him that she had guarantied the purchase he would pay the bill. He asked for, and was allowed to take, the guaranty to show to his wife, presumably to ask her whether she did make it, and in a few days returned it with a letter, neither denying nor admitting his liability. The defendant offered to pay half of the claim before suit brought. Taking this evidence as true, as we must on this appeal, it is clear that the jury would have been warranted in drawing the inference that Mrs. Levy had authority from the defendant to sign his name to the guaranty. It is impossible to lay down any inflexible rule by which it can be determined what evidence shall be sufficient to establish an agency in any given case; but it may be said, in general terms, that whatever evidence has the tendency to prove the agency is admissible, even though not full and satisfactory, as it is the province of the jury to pass upon it. Bickford v. Menier, 36 Hun, 446; Manufacturing Co. v. Burns, 15 N. Y. St. Rep. 570; Leslie v. Insurance Co., 63 N. Y. 27; and see Railroad Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578; Morrison v. Whiteside, 17 Md. 452, 79 Am. Dec. 661. Apart from the question of original authority, there was sufficient evidence of ratification to go to the jury. 1 Lawson, Rights, Rem. & Pr. § 41; Harrod v. McDaniels, 126 Mass. 415; Cairnes v. Bleecker, 12 Johns. 300; Jervis v. Hoyt, 2 Hun, 637;

[25] Accord: Elliott v. Bodine, 59 N. J. Law, 567, 36 Atl. 1038 (1896).

Johnson v. Jones, 4 Barb. 369; Stilwell v. Insurance Co., 72 N. Y. 392.

The case ought to have gone to the jury. It was error to dismiss the complaint, and the judgment entered on such dismissal must be reversed, and a new trial ordered, with costs to the appellant to abide the event.

BOOTH v. KESSLER.

(Supreme Court of Nebraska, 1901. 62 Neb. 704, 87 N. W. 532.)

Action in equity to foreclose a mortgage which plaintiff alleged he purchased bona fide for value from one Weiss. Defendant claimed Weiss was the agent of plaintiff and that plaintiff was not an innocent purchaser. Kessler applied for a loan in an application which designated Weiss as his agent. The note and mortgage were made out to Weiss, and the money was sent to Weiss by plaintiff and credited to his account in the bank of which Weiss was cashier. Weiss assigned the mortgage to plaintiff, but before it was paid over to defendant the bank failed.

HOLCOMB, J.[26] * * * In this connection it is pertinent to remark that the evidence is entirely clear upon the point that the application for the loan was made for the purpose of paying a balance due on a prior mortgage; that the prior mortgage was not satisfied, and that plaintiff was advised of this fact when he accepted the note and mortgage in question; and that he forwarded the money to Weiss evidently for the purpose of having the prior mortgage satisfied before he intended the transaction should be closed. Other evidence of much the same character was introduced.

We cannot say the trial court was not justified, from all the facts and circumstances shown in evidence, in finding that in the transaction Weiss acted as the agent of the plaintiff, and that plaintiff did not in fact purchase the note and mortgage of Weiss as alleged. There is no very serious conflict or contradiction in the evidence. Aside from the testimony of the plaintiff wherein he testifies that he bought the note and mortgage of Weiss, and paid him for them,—which is in the nature of a conclusion, rather than a statement of facts,—there is no substantial controversy as to the facts surrounding the transaction, and which lead up to and establish the ultimate fact and chief point in controversy; that is, the character of the transaction as between the three active agents thereto and principal participants therein. We incline to the view that, as established by the evidence, it is a case where reasonable minds might very properly differ as to the proper conclusions to be drawn therefrom, and, if so, we are not warranted in disturbing the finding, even

[26] Part of the opinion is omitted.

though we might be of the opinion that a different conclusion than reached by the trial court might be more proper.[27] The rule is that on appeal and a trial de novo the findings of the district court will not be disturbed unless they cannot be reconciled with any reasonable construction of the testimony, Gadsden v. Phelps, 37 Neb. 590, 56 N. W. 314; that when only questions of fact are presented, as to which there is sufficient evidence to sustain the findings of the district court, judgment will be sustained, Cunningham v. Katz, 38 Neb. 29, 56 N. W. 711. Findings on questions of fact by a trial court are entitled to the same weight and the same presumption of correctness as a verdict of a jury, and the rule is the same whether the case is brought to this court on error or appeal, and applies to all classes of actions. Burlingim v. Warner, 39 Neb. 493, 58 N. W. 132.

The decree appealed from must be affirmed.

[27] It is not the business of the court to weigh the evidence and decide which party has the preponderance when the matter has been properly submitted to the jury. The court will set aside a verdict on the ground of insufficient evidence only when it is clear the jury acted in total disregard of evidence and against its greatest weight. Marshall v. Rugg, 6 Wyo. 270, 44 Pac. 700, 45 Pac. 486, 33 L. R. A. 679 (1896); Sherlock v. Van Asselt, 34 Wash. 141, 75 Pac. 639 (1904).

The preponderance of the evidence may be so great against the verdict of the jury as to require a reversal in the interest of justice. Horowitz v. Hines, 47 Misc. Rep. 158, 93 N. Y. Supp. 469 (1905). But compare Gates v. Max, 125 N. C. 139, 34 S. E. 266 (1899), holding to the older rule that if there is more than a scintilla of evidence the court cannot withdraw the question from the jury.

See, also, ante, pp. 338 and 827.

CHAPTER IV

TRIAL—PROVINCE OF COURT AND JURY

SOUTH & NORTH ALABAMA R. CO. v. HENLEIN.

(Supreme Court of Alabama, 1875. 52 Ala. 606, 23 Am. Rep. 578.)

Action for failure to deliver a steer received by defendant company for transportation to Montgomery, Alabama. Judgment for plaintiff and defendant appeals.

BRICKELL, C. J.[1] The contract of shipment contemplates that the owner or his agent shall attend the live-stock while in the course of transportation, and imposes on him the duty of feeding and watering them, at his own expense, if delays or accidents occurred. The stock left the place of shipment in charge of an agent of the owner, who was with them, when delivered to the appellant. The cause of the death of the animal, for the loss of which a recovery is sought in this case, was matter of controversy in the circuit court. Delays in transportation had occurred, and it may have been supposed the want of food and water, during the delay, was the cause of death. The appellant, to relieve itself from all imputation of negligence in this respect, offered to prove that at Birmingham, after the delays, when no visible injury had happened, its agent proposed to a person, claiming to be in charge of the stock, to switch off the car, on which the stock was loaded, and feed and water them. This person refused to permit this to be done. The court excluded this evidence, because not connected with other evidence, that the person to whom the proposition was made was the agent of the owners.

The acts or declarations of one professing to be the agent of another are not binding on the principal until his authority is shown, or the assent to, or ratification of such acts or declarations. McClung's Ex'rs v. Spotswood, 19 Ala. 165.

When the fact of agency rests in parol, its existence and the extent of the authority conferred are matters of fact for the determination of the jury. Whatever evidence has a tendency to prove the agency is admissible. In the case cited, C. J. Dargan said: "The correct rule is this, if there be no proof whatever tending to prove the agency, the act may be excluded from the jury by the court; but if there is any evidence tending to prove the authority of the agent, then the act cannot be excluded from them, for they are the judges of the weight and sufficiency of the testimony." In determining the admissibility of evidence, its sufficiency must be lost sight of in a

[1] Part of the opinion is omitted.

great degree; it may be weak and inconclusive, yet if it is relevant and has a tendency to prove a material fact, it cannot be excluded without invading the province of the jury. When the fact offered to be proved is connected with the fact that the contract of shipment contemplates the presence of the owner or his agent during the transportation of the stock, and imposes on him the duty of watering, feeding, and caring for them, and with the fact that when the stock left the place of shipment they were in charge of an agent, who was with them when delivered to the appellant; the evidence offered was admissible. The fact that the person to whom the offer was made was in charge of the stock, claiming to be the agent, in connection with these facts, had a tendency to show he was the agent; and in the absence of contradictory evidence might have been received by the jury as sufficient. He was where the agent should have been, and exercising the authority the agent had. The point of dispute is not whether the owners had an agent who should have been in charge of the stock at the time and place of the offer, but whether the person to whom the offer was made was such agent. The existence of an agency not being controverted, the evidence should have gone to the jury, and under proper instructions from the court they should have determined whether the person to whom the offer was made was or not appellee's agent. The evidence given by the appellees that their agent left the train conveying the stock before it reached Birmingham, and was not there when the train arrived or left, does not affect the admissibility of the evidence rejected. It was contradictory of the fact that the person to whom the offer was made was the agent of the appellees; but the fact that evidence is in conflict with or contradictory of other evidence is not involved in an inquiry as to its admissibilty. Its credibility and sufficiency is affected by such conflict or contradiction, and there the duty of the jury intervenes to determine the weight it should receive in view of the conflict.[2] * * *

Reversed and remanded.

[2] Not only the fact but the scope of the agency are for the jury. Lough v. Davis & Co., 35 Wash. 449, 77 Pac. 732 (1904).

When but one conclusion can be drawn from the facts, the court should direct a verdict. Wright v. Vineyard M. E. Church, 72 Minn. 78, 74 N. W. 1015 (1898). See, also, Rapid Hook & Eye Co. v. De Ruyter, 117 Mich. 547, 76 N. W. 76 (1898), in which there was no evidence of agency or ratification. Franklin Bank Note Co. v. Mackey, 158 N. Y. 140, 52 N. E. 737 (1899). The question whether there is any evidence tending to show agency is for the court. Trimble v. Mercantile Co., 56 Mo. App. 683 (1894); Held v. Auerbach (Sup.) 88 N. Y. Supp. 158 (1904). See, also, Claflin v. Continental Works, ante, p. 338, as to written power. As to determination of written authority and its scope, see the leading case of Loudon Savings Fund Society v. Hagerstown Savings Bank, 36 Pa. 498, 78 Am. Dec. 390 (1860), post, p. 853. When the writing negatives agency, the court should say to the jury as a matter of law that there is no agency. Simonds v. Wrightman, 36 Or. 120, 58 Pac. 1100 (1899).

WILCOX v. HINES.

(Supreme Court of Tennessee, 1897. 100 Tenn. 524, 45 S. W. 781, 66 Am. St. Rep. 761.)

Action for injuries caused by the falling of a porch of a house owned by defendant Wilcox and leased to plaintiff's father. There was evidence that Wilcox knew of the rotten timbers in the porch and promised to have them fixed, that shortly after a carpenter fixed the porch by putting a wooden post under it. Judgment for plaintiff for $4,500 damages. Upon a remittitur by plaintiff of $3,000 the circuit judge overruled a motion for a new trial, and pronounced judgment for plaintiff for $1,500.

McALISTER, J.[3] * * * The third assignment is that the court erred in admitting testimony that, after the post beneath the porch was fixed, the workman remarked, "Now, that is safe." On this subject the court, in its fifth instruction to the jury, said, viz.: "If you believe from the proof that the carpenter was sent there for the purpose of making the repairs by the defendant or his authorized agents in charge of the property, then the statement or assurance of said carpenter, while performing the carpenter's work, with reference to the porch being safe, on the completion of the work he had been sent to do, would be admissible, and such statements would be binding upon defendant; but if the proof fails to establish the fact to your satisfaction that defendant or his authorized agents, etc., did send said carpenter upon the premises for the purpose of making the repairs upon said porch, then said carpenter was not the agent or representative of defendant, and defendant is not bound by anything done or said by said carpenter in making said repairs."

The evidence above mentioned was objected to upon the ground that the court must find, before admitting such declarations, that the negro who fixed the post was the agent of defendant. It being a matter of controversy, upon the proof, whether the negro post-fixer was employed by the defendant, the court declined to adjudge the question of agency, but left it, as a disputed question of fact, for the settlement of the jury. The alleged error of the trial judge was in submitting the admissibility of testimony to the jury, and in not determining it himself. It is insisted that, if the admissibility of the testimony depends upon any fact, that fact must be found by the court to exist. We are of opinion the ruling of the circuit judge was correct. In 1 Am. & Eng. Enc. Law (2d Ed.) p. 967, the rule is stated thus: "If the evidence adduced to support a claim of agency is undisputed, whether it exists or not is one of law, for the court. Whenever it is disputed, however, it is one of

[3] Part of the opinion is omitted.

mixed law and fact, for the consideration of the jury, aided by instructions from the court."

In the case of Gulick v. Grover, 33 N. J. Law, 463, 97 Am. Dec. 728, it was held that "when the facts are undisputed the question whether an agent has the requisite authority to bind his principal is a question of law, for the court, whether such authority is sought to be sustained by a previous authorization or by subsequent ratification."

In the case of Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank, 36 Pa. 498, 78 Am. Dec. 390, the court said, viz.: "If the authority [of the agent] be created by power of attorney, or other writing, the instrument itself must, in general, be produced; and since the construction of writings belongs to the court, and not to the jury, the fact and scope of the agency are in such cases questions of law, and are properly decided by the judge. But the authority may be by parol, or it may be implied from the conduct of the employer in sanctioning the credit given to a person acting in his name. * * * And in all instances, where the authority, whether general or special, is to be implied from the conduct of the principal, or where the medium of proof of agency is per testes [by witnesses], the jury are to judge of the credibility of witnesses, and of the implications to be made from their testimony." The court then said that: "As the plaintiff here did not produce any written evidence of Easten's agency, it was the duty of the court to inform the jury what constitutes agency, express or implied, special or general, and to refer to them the questions: First, whether the evidence satisfied them that Easten was either the general or special agent of the defendants; and, second, whether the issuing of the certificate in suit was within the scope of his authority."[4] Mechem, Ag. § 105. * * *

Judgment affirmed.

[4] RATIFICATION. The same principles govern the conduct of the trial when the decision hinges upon ratification of the agent's acts. Wright v. Vineyard M. E. Church, 72 Minn. 78, 74 N. W. 1015 (1898); Rapid Hook & Eye Co. v. De Ruyter, 117 Mich. 547, 76 N. W. 76 (1898); Sanford v. Fountain, 49 Misc. Rep. 301, 99 N. Y. Supp. 234 (1906); Simon v. Johnson, 105 Ala. 344, 16 South. 884, 53 Am. St. Rep. 125 (1894). See, also, ante, pp. 100, 112, 316.

CHAPTER V

JUDGMENT AND DAMAGES

CASSABOGLOU v. GIBBS.

(Queen's Bench Division of the High Court of Justice, 1882. 9 Q. B. Div. 220, 51 L. J. Q. B. 593, 47 L. T. Rep. 98, 46 J. P. 568.)

WATKIN WILLIAMS, J. This was a Special Case stated by consent of the parties for the opinion of the Court as to the measure of damages which the plaintiff was entitled to recover against the defendants under the following circumstances: The plaintiff is a merchant in London. The defendants are commission agents at Hong Kong, having an agency in London. On the 23rd of March, 1880, the plaintiff inquired of the defendants by telegram at what price they would buy for him cases of the finest dry new crop Persian opium. The defendants replied to this, and on the 25th of March the plaintiff gave them orders to buy for his account certain cases of the opium described, and to have them shipped by mail steamer. About the 26th of March, 1880, the defendants purchased for the plaintiffs what they believed, though erroneously as it turned out, to be finest dry new crop Persian opium, and on the 30th of March by letter advised the plaintiff of the purchase. On the 7th of April, 1880, the defendants forwarded to the plaintiff invoices of the opium, and advised him that they had drawn upon him for the amounts—namely, £1,221. 3s. 11d. and £2,346. 12s. The plaintiff duly accepted and paid these drafts. Upon the arrival of the opium in London it was discovered that no part of it was in accordance with the order, but it was soft and oily, and unfit for the purposes to which the finest dry Persian opium is applicable. It is admitted for the purposes of this case that there was not in the market at Hong Kong any finest dry new crop Persian opium, and that the defendants could not have purchased any for the plaintiff. The plaintiff immediately rejected the whole of the opium, and refused to accept it. The plaintiff, having already sold a portion of the opium, had to make an allowance to the purchasers of £170. on account of the inferiority of quality. The remainder of the opium was sold at a lower price than that paid for it by the plaintiff. The plaintiff then brought this action against the defendants for compensation for his loss, and in clause 15 of the case his claim is thus expressed: "The plaintiff claims to be recouped or paid by the defendants the difference between the market price of the article ordered and the proceeds of the sale of the drug actually sent, as damages for the above-men-

tioned alleged breach of the contract of agency or alleged failure to perform at all the said contract, or alleged gross and culpable negligence as such agents in their conduct of such agency and performance of their duties in connection therewith, or as damages for the breach of warranty and promise to purchase alleged to be contained in the telegrams and letters. The defendants have paid into Court the sum of £300., and the plaintiff admits that if the defendants are only liable to make good the loss actually sustained by him in consequence of the defendants' breach of duty the £300. is sufficient to satisfy his claim, and the question is whether the plaintiff is entitled to claim for loss beyond that amount."

We are of opinion that the plaintiff is not entitled to recover from the defendants anything beyond his actual loss. The plaintiff employed the defendants as his agents to purchase the opium for him, and their duty was to use due care, skill and diligence in executing his orders, and for their failure in this respect they are liable to the plaintiff for all loss and damage sustained by him through their omission and negligence.

The plaintiff seeks to treat them as vendors of the opium to him, and to hold them responsible for damages as for a breach of warranty of the kind and quality of the goods, in which case the measure of damages would be not merely the difference between the cost to him of the goods and their real value, but the difference between the value of goods of the description sold and of the goods actually sent. A single illustration is sufficient to shew the fallacy of the plaintiff's contention. Suppose one instructs a commission agent to purchase for him a very valuable original picture, if it should be offered for sale, and the agent carelessly bids for a picture under the belief that it is the original, and it is knocked down to him for, say, £100., and he informs his employer that he has bought the picture for that sum, and his employer remits the money, and the picture is forwarded, but upon arrival is discovered to be merely a copy. The employer rejects the picture, and it is sold for £90. Now suppose that if it had been the original picture it would have been worth £1,000. Is the agent liable for £910. damages, or only for the actual loss caused to his employer through his want of care and skill.[1] It seems to us that the latter is the true measure of damages, and therefore that our judgment should be for the defendants.

Judgment for the defendants.

[1] The idea of damages is to give to the principal a recompense for the wrong done, for the loss sustained by the agent's default. Hamilton v. Cunningham, Fed. Cas. No. 5,978, 2 Brock 350 (1828), per Marshall, Circuit Judge; Plumb v. Campbell, 129 Ill. 101, 18 N. E. 790 (1888).

Speculative damages, depending on possible schemes, should not be given. Bell v. Cunningham, 3 Pet. 69, 7 L. Ed. 606 (1830), per Marshall, C. J.

FOLSOM v. MUSSEY.

(Supreme Judicial Court of Maine, 1833. 10 Me. 297.)

Defendant sold lumber for plaintiff to one Houdlette, taking a note from the vendee, who was doing a large business, but who proved to be insolvent. Defendant took some steps to secure the debt, getting a note signed by Houdlette and one Lilly, but was neither careful nor skillful in following it up and in trying to realize on the security taken. It appeared, however, that no security of value could have been obtained. Before the insolvency of the vendee appeared, defendant had made a provisional settlement with plaintiff by giving his note for $653.43, it being understood that he should pay only what he collected. Plaintiff brings assumpsit on the note. Verdict for defendant.

WESTON, J. The jury have found that the defendant, in relation to the business confided to him, had been guilty of no negligence to the prejudice of the plaintiff, or by which he had suffered loss. To omit to do that, which if done would have been fruitless and unavailing, can in no proper sense be denominated negligence. The jury were upon this point properly instructed; and it was their province to pass upon the facts. Although the defendant had done his duty to the plaintiff, as the jury have found, yet he might have assumed to himself the Houdlette debt, and the Judge was requested to rule at the trial, that this was the inference necessarily to be drawn from the facts. The defendant was endeavoring to secure his principals. His proceedings from time to time were directed to that object. The security from Lilly was not divided precisely as it ought to have been; but it all turned out to be of no value.[2] We perceive nothing in the facts conclusively proving that the defendant made, or intended to make, the Houdlette debt his own. He was not bound to take that hazard upon himself. He was required only to be faithful to his trust; and the jury have settled all the facts in favour of the defendant.

Judgment on the verdict.

[2] It is always competent for the agent to show that, notwithstanding his fault, his principal has suffered no damages. First Nat. Bank v. Fourth Nat. Bank, 77 N. Y. 320, 33 Am. Rep. 618 (1879). In such case he will be liable for only nominal damages at most. Allen v. Suydam, 20 Wend. 321, 32 Am. Dec. 555 (1838); Van Wart v. Wooley, 3 B. & C. 439, 10 E. C. L. 204, 1 M. & M. 520, 22 E. C. L. 578 (1824).

There can be no recovery for the negligence of the agent from whom no loss is shown, even though it is possible there may be a loss in the future. Porter v. Woodruff, 36 N. J. Eq. 174 (1882).

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